LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 414

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1951

CERTIORARI GRANTED JANUARY 2, 1952

TABLE OF CONTENTS OF APPENDIX

	Page
1. Docket entries	1a
2. Libel	3a
3. Respondent's exceptions to libel	6a
4. Respondent's exceptive allegations	8a
5. Respondent's motion to dismiss	10a
6. Libelant's answer to motion to dismiss	19a
7. (a) Libelant's answer to exceptive allegations	20a
(b) Libelant's answer to respondent's exceptions and exceptive allegations	22a
8. Opinion by McGranery, J., filed November 21, 1947	23a
9. Respondent's answer	27a
10. Libelant's interrogatories	31a
11. Respondent's answers to interrogatories	33a
12. Libelant's motion to compel production of documents, filed November 4, 1948	38a
13. Transcript of hearing on motion to compel respondent to produce testimony before Army Board of Investigation held January 3, 1950	40a
14. Respondent's affidavit in opposition to motion for production of documents, filed January 12, 1950	55a
15. Libelant's affidavit in support of motion for production of documents, filed August 14, 1950	58a
16. Opinion by Kirkpatrick, J., filed August 14, 1950, sur libelant's motion for production of documents	61a
17. Claim of privilege by the Secretary, Department of the Army, filed October 9, 1950	64a
18. Affidavit by Ralph Sears, Col., Transportation Corps, re the employment of the Army Tug LT-221, filed October 9, 1950	65a
19. Affidavit of Alexander Corey, Chief of Civilian Personnel, Transportation Corps, U. S. Army, filed October 9, 1950	67a
20. Respondent's motion for rehearing upon libelant's motion for production of documents, filed October 17, 1950	69a
21. Affidavit on behalf of libelant, filed October 24, 1950	72a
22. Certified copies of documents in the file of the Bureau of Employees Compensation filed of record October 25, 1950	73a
(a) Bureau of Employees Compensation letter of November 12, 1949, to Mrs. E. D. McNamee (formerly Dillehay) advising of increase in compensation payments	74a
(b) Bureau of Employees Compensation statement of adjustment of death benefit payments under Public Law 357—81st Cong., dated November 10, 1949	75a
(c) Bureau of Employees Compensation statement of compensation payments in the case of Robert Willie Dillehay, Jr.	76a

Page

(d) Bureau of Employees Compensation findings of fact and amended compensation order in the case of Robert Willie Dillehay, Jr., dated February 2, 1947 ..... 78a

(e) Bureau of Employees Compensation findings of fact and award in the case of Robert Willie Dillehay, Jr. 80a

(f) Release executed by Eleanor B. Dillehay, dated February 12, 1946 ..... 82a

(g) Bureau of Employees Compensation letter dated June 15, 1945 ..... 84a

23. Libelant's answer to motion for rehearing, filed October 27, 1950 ..... 88a

24. Order of court denying respondent's motion for rehearing upon the motion for production of documents, filed November 1, 1950 ..... 90a

25. Order of District Court, filed November 1, 1950, requiring respondent to produce notes of testimony before Army Board of Investigation except for statements of the Master of the LT-221 ..... 90a

26. Libelant's affidavit re deposition of Capt. Ernest O. Hambacher, filed November 3, 1950 ..... 91a

27. Libelant's motion for judgment because of respondent's failure and refusal to produce documents in violation of an order of court, filed December 11, 1950 ..... 93a

28. Transcript of hearing on motion for judgment held December 11, 1950 ..... 95a

29. Interlocutory decree in favor of libelant directing that case proceed to trial solely on the question of damages, filed December 11, 1950 ..... 98a

30. Notice of Appeal and order allowing appeal, filed December 20, 1950 ..... 99a

Proceedings in the U.S.C.A. for the Third Circuit 100
Opinion, Goodrich, J. 100
Judgment 109
Clerk's certificate 110
Order allowing certiorari 110

APPENDIX TO BRIEF FOR APPELLANTS

Relevant Docket Entries

Index No.	*Date*	*Docket Entries*
1.	Oct. 8, 1946.	Libel filed. Citation issued, returnable Oct. 18, 1946.
2.	Oct. 15, 1946.	Citation returned with affidavit of service attached thereto, filed.
3.	Oct. 30, 1946.	Exceptions of U.S. to libel filed.
4.	Oct. 30, 1946.	Exceptive allegations of U.S. filed.
5.	Oct. 30, 1946.	Defendant's motion to dismiss filed.
6.	June 24, 1947.	Order to place case on argument list filed.
7.	Oct. 17, 1947.	Libelant's answer to motion to dismiss filed.
8.	Oct. 17, 1947.	Libelant's answer to exceptive allegations filed.
9.	Oct. 17, 1947.	Libelant's answers to exceptions to libel filed.
10.	Nov. 21, 1947.	Opinion, McGranery, J., striking respondent's exceptions and denying motion to dismiss, etc. filed.
11.	Jan. 23, 1948.	Answer filed.
12.	Feb. 3, 1948.	Libelant's interrogatories filed.
13.	May 3, 1948.	Libelant's motion to compel answers and order of court requiring respondent to answer interrogatories within 21 days filed.
14.	June 21, 1948.	Libelant's motion for judgment for failure to answer interrogatories filed.
	Aug. 25, 1948.	Hearing sur motion for judgment.

15. Sept. 16, 1948. Defendant's answers to interrogatories filed.

16. Nov. 4, 1948. Libelant's motion for production of documents filed.

17. Nov. 4, 1948. Libelant's motion for judgment for failure to answer interrogatories as required by order of court filed.

18. Nov. 5, 1948. Order to place motion for production of documents on argument list filed.

19. Nov. 5, 1948. Order to place motion for judgment on argument list filed.

Dec. 13, 1948. Hearing sur libelant's motion for production of document and sur motion for judgment for failure to answer interrogatories C.A.V.

20. Dec. 6, 1949. Order of court denying motion for judgment for failure to answer interrogatories filed.

21. Dec. 12, 1949. Order to place case on argument list filed.

Jan. 3, 1950. Argued sur libelant's motion for production of documents.

22. Jan. 12, 1950. Affidavit of Patrick F. Cooney filed.

23. Jan. 12, 1950. Transcript of hearing Jan. 3, 1950.

24. Aug. 14, 1950. Affidavit of Wm. Alper in support of motion for production of documents filed.

25. Aug. 14, 1950. Opinion, Kirkpatrick J., granting libelant's motion for production of documents, except as to statements of the master, filed.

26. Oct. 9, 1950. Claim of privilege by the Secretary, Dept. of Army, filed.

27. Oct. 9, 1950. Affidavit by Ralph Sears, Col. T.C.

28. Oct. 9, 1950. Affidavit of Alexander Corey, Chief of Civilian Personnel, etc., U.S. Army, filed.

29. Oct. 17, 1950. Motion by respondent for rehearing upon libelant's motion for production of documents filed.

30. Oct. 24, 1950. Affidavit on behalf of libelant filed.

31. Oct. 25, 1950. Certified copies of documents in file of Federal Security Agency up to October 7, 1948 filed.

32. Oct. 25, 1950. Certified copies of documents in file of Federal Security Agency from October 7, 1948 to date filed.

33. October 27, 1950. Libelant's Answer to Motion for Rehearing filed.

Oct. 30, 1950. Hearing sur settlement of Decree and sur Motion for Rehearing (Order to be submitted).

34. Nov. 1, 1950. Order of Court directing respondent to produce certain notes of testimony filed.

35. Nov. 1, 1950. Order of Court denying motion for rehearing filed.

36. Nov. 3, 1950. Affidavit of libelant's counsel re deposition of Capt. Ernest O. Hambacher filed.

37. Dec. 11, 1950. Libelant's motion for an interlocutory decree in favor of libelant directing that case proceed to trial solely on question of damages filed.

38. Dec. 20, 1950. Defendant's notice of appeal and order of court allowing appeal filed.

39. Dec. 20, 1950. Copy of clerk's notice to U.S. Court of Appeals filed.

40. Jan. 4, 1951. Transcript of hearing of December 11, 1950 before Judge Kirkpatrick in chambers filed.

[Title of Court and Cause]

LIBEL IN PERSONAM

[Endorsed: Filed October 8, 1946]

The libel and complaint of Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., deceased, against the United States of America in a cause

of action for damages, civil and maritime, alleges, to wit:

1. The respondent, United States of America has by law consented to be sued herein.

2. Upon information and belief, libellant avers that at all times mentioned herein, the United States of America owned, operated and controlled the tug LT-221 as a merchant vessel in foreign commerce.

3. On or about the 15th day of October, 1944 and at all times mentioned herein, libellant's intestate, Robert Willie Dillehay, Jr., was in the employ of the respondent as a member of the crew of the tug LT-221, in the capacity of Second Assistant Engineer on a foreign voyage from New York, N. Y., to undisclosed ports anywhere in the world and return for a period of one year.

4. Upon information and belief, libellant avers that on or about the 15th day of October, 1944 at or about 10:00 A.M. o'clock, the tug LT-221 while in navigable waters at or near the port of Caglaria, Sardinia, suddenly suffered a violent explosion which was due to defective and inadequate boilers, internal mechanisms and other appliances and/or being negligently navigated into or causing contact with mines or other explosive devices, as a consequence of which the vessel sank, and as a result of all of which libellant's intestate met his death.

5. Disregarding its duties in the premises, respondent by its agents, servants and employees was careless and negligent in:

(a) failing to navigate the vessel in a safe and proper manner under the circumstances;

(b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;

(c) failing to maintain a proper and adequate lookout under the circumstances;

(d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;

(e) failing to provide, maintain and operate proper, safe and adequate engines, boilers, internal machinery and appurtenances thereto;

(f) causing the explosion as aforesaid;

(g) failing to provide, maintain and operate proper and adequate warning and signal devices;

(h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances;

(i) failing to provide, maintain and operate proper and adequate life rafts, lifeboats, life preservers and other safety and life saving equipment under the circumstances;

(j) failing to provide a safe and seaworthy vessel and appurtenances and to keep same in a safe and seaworthy condition.

6. As a further consequence of the negligence of the respondent, libellant avers that the deceased suffered severe and agonizing pain and shock and mental anguish before he died.

7. At the time deceased entered the respondent's employ, he was a strong, robust and able bodied man with the prospect of substantial advancement and earning capacity.

8. During the period of the deceased's employ by the respondent, he well and truly performed all of his duties in a capable and satisfactory manner.

9. The decedent left surviving him as his heirs-at-law and next-of-kin his wife, Eleanor B. Dillehay, and his daughter, Doris Ann Dillehay.

10. Libellant, Samuel Mandel, was appointed administrator of the estate of the deceased, Robert Willie

Dillehay, Jr. on the 1st day of October, 1946, on the order of the Register of Wills of Philadelphia County, State of Pennsylvania.

11. Libellant brings this action on behalf of Eleanor B. Dillehay and Doris Ann Dillehay under and by virtue of Section 33 of the Merchant Marine Act of 1920, 46 U.S.C.A. Section 688 and claims damages in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00) for this cause of action.

WHEREFORE, libellant prays that a citation in due form of law according to the rules and practice of this Honorable Court in a cause of admiralty and maritime jurisdiction may issue against the said respondent herein, citing them to appear and answer all and singular the matters aforesaid and that libellant may have judgment for the amount of One Hundred and Fifty Thousand Dollars ($150,000.00) with interest and costs and such other and further relief as the Court may deem just.

FREEDMAN, LANDY & LORRY,
By (S.)—ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Verification Omitted]

[Title of Court and Cause]

RESPONDENT'S EXCEPTIONS TO LIBEL

[Endorsed: Filed October 30, 1946]

The exceptions of the United States of America, respondent, in the above entitled cause, appearing specially herein, respectfully show:

1. That it appears from said libel and from the exceptive allegations annexed hereto and made a part

hereof that this court has no jurisdiction under the Suits in Admiralty Act for the reason that the U.S. Army Tug LT-221 was a public vessel of the United States and was not operated as a merchant vessel within the meaning of the Suits in Admiralty Act.

2. That it appears from said libel and from the exceptive allegations annexed hereto and made a part hereof that libelants intestate, Robert W. Dillehay, Jr., was a member of the crew of public vessel of the United States and was entitled to compensation under the U.S. Employees' Compensation Act and he is therefore precluded from suing the United States under the Public Vessels Act, Bradey v. U.S. 151 F. (2d) 742, certiorari denied 326 U.S. 795.

3. That it appears from said libel and from the exceptive allegations annexed hereto and made a part hereof that an award of employees' compensation has been made under the U.S. Employees' Compensation Act and accepted under that act by (Mrs.) Eleanor B. Dillehay and Doris Ann Dillehay, heirs of said Robert W. Dillehay, Jr. and that compensation having been accepted no suit is permitted against the United States under Dahn v. Davis 258 U.S. 421.

WHEREFORE respondent prays that said libel may be dismissed.

(S.) GERALD A. GLEESON,
U. S. Attorney,
Proctor for respondent,
Appearing Specially.

[Title of Court and Cause]

RESPONDENT'S EXCEPTIVE ALLEGATIONS

[Endorsed: Filed October 30, 1946]

The exceptive allegations of the United States, appearing specially herein, respectfully show:

I

That at all times hereinafter mentioned the said LT-221, was in truth the U.S. Army Tug LT-221 owned and operated by the U.S. Army as a public vessel of the United States.

II

That libelant's intestate, Robert W. Dillehay, Jr., was a direct employee of the United States War Department and was a Civil Service employee of the United States Government.

III

That libelant's intestate, Robert W. Dillehay, Jr., was a member of the crew of the U.S. Army Tug LT-221 when that vessel struck a minefield off the coast of Sardinia on October 15, 1944 and exploded as a result of the explosion of said mines.

IV

That Robert W. Dillehay, Jr., as a civilian employee of the U.S. Army, was covered by and entitled to the benefits of the U.S. Employees' Compensation Act.

V

That on March 5, 1946, the U.S. Employees' Compensation Commission made an award of compensation on the claim (for the death of Robert W. Dillehay, Jr.)

filed by (Mrs.) Eleanor B. Dillehay on behalf of Doris Ann Dillehay.

VI

That on February 12, 1946 said Eleanor B. Dillehay in accepting employees' compensation on behalf of Doris Ann Dillehay, did release the U.S. and all its departments of any claim arising out of the death of her husband, Robert Willie Dillehay, Jr.

VII

That in December, 1945, said Eleanor B. Dillehay received $5500 in war risk benefits from war risk insurance carried by the War Department with the War Shipping Administration.

VIII

That by reason of the foregoing this court has not jurisdiction of the cause of action alleged under the Suits in Admiralty Act (46 U.S.C. 741-752); that although the U.S. Army tug LT-221 was a public vessel of the United States, libelant's intestate as a War Department employee covered by U.S. employees' compensation was precluded from suit under the Public Vessels Act (46 U.S.C. 781-790) for injuries suffered as one of the crew of a public vessel; and that a compensation award having been made by the U.S. Employees' Compensation Commission and accepted by the heirs of libelant's intestate, no suit against the United States is permitted and the compensation is libelant's exclusive remedy.

(S.) GERALD A. GLEESON,
U. S. Attorney.

[Title of Court and Cause]

RESPONDENT'S MOTION TO DISMISS

[Endorsed: Filed October 30, 1946]

The United States of America, appearing specially herein, hereby moves the Court to dismiss the libel in the above case, upon the annexed affidavit and the statements contained in the face of the libel, for the following reasons:

1. The LT-221 alleged by libelant to be a merchant vessel of the United States was at all times material hereto, the United States Army Tug LT-221 owned and operated by the United States Army as a public vessel of the United States; and that libelant's proctors well know that this is the case as shown by the correspondence annexed to the affidavit herein.

2. That Robert W. Dillehay, Jr. was a direct employee of the War Department, a Civil Service employee of the United States, entitled to United States Employees' Compensation and that he is precluded from suing the United States under the Public Vessels Act, *Bradey* v. *United States,* 151 F. (2d) 742.

3. That the United States Employees' Compensation Commission has made an award of compensation in the above case, which has been accepted by Mrs. Eleanor B. Dillehay and by Doris Ann Dillehay, heirs of Robert W. Dillehay, Jr., and that the award of United States Employees' Compensation precludes any suit against the United States. *Dahn* v. *Davis,* 258 U. S. 421.

(S.) GERALD A. GLEESON,
United States Attorney.

[Title of Court and Cause]

AFFIDAVIT

R. L. Hiller, being duly sworn, deposes and says:

That he is a member of the bar of this Honorable Court and is the Assistant United States Attorney in charge of the above case and upon information and belief states as follows:

1. That the LT-221 was a U. S. Army tug owned and operated by the U. S. War Department and was sunk in a mine field off the coast of Sardinia on October 15, 1944. That as shown by the letter from Messrs. Freedman, Landy & Lorry to the Army Transport Service, dated September 11, 1946, and annexed hereto as Exhibit A:

> "The above decedent entered the Merchant Marine in 1943 and was trained at the Marine Officers' Training School at St. Petersburg, Florida. Upon graduation from that school, he was sent to New Orleans, where he was assigned to United States Army Tug—LT221, as a civilian employee of the United States Army. He was a member of the crew of that vessel for almost one year, during which time he was promoted to Second Assistant Engineer. While in the service of this vessel, he died when the vessel exploded and sank on October 15th, 1944.
>
> "We have been informed that the vessel was navigated into a fixed mine field as it was approaching the harbor of Caglaria, Sardinia, struck a mine, and sank within two minutes with heavy loss of life."

2. That as a civilian employee of the U. S. Government Robert W. Dillehay, Jr. was covered by the U. S.

Employees' Compensation Act and as is shown by letter from the U. S. Employees' Compensation Commission to Mrs. Eleanor B. Dillehay dated March 5, 1946 (annexed hereto as Exhibit B) and her release dated February 12, 1946 (Exhibit C) a compensation award has been made and accepted by Mrs. Dillehay on behalf of a minor child, Doris Ann Dillehay.

3. That as is shown by letter dated September 24, 1946 (annexed hereto as Exhibit D) from the Chief of the Water Transport Service, U. S. Army, to Messrs. Freedman, Landy & Lorry they were advised that Mrs. Dillehay had been paid $5500 in war risk benefits and that her daughter was being paid compensation at the rate of $17.50 a month; that Robert W. Dillehay, Jr. was a civilian employee of the Government and was entitled to employees' compensation.

The sources of my information and the grounds for my belief are official documents and records obtained from the War Department.

(S.) R. L. HILLER.

Sworn and subscribed before me this 30th day of Oct., 1946.

(S.) ROBERT T. PRESS,
Deputy Clerk,
U. S. District Court Eastern
District of Pennsylvania.

[Exhibit A to Affidavit]

FREEDMAN, LANDY & LORRY

Counsellors at Law and Proctors in Admiralty
906 Jefferson Building—1015 Chestnut Street
Philadelphia 7, Pa.

September 11th, 1946.

Army Transport Service
United States Army
Washington, D. C.

Re: Robert W. Dillehay, Jr., Deceased

Gentlemen:

We represent the Estate of Robert W. Dillehay, Jr., deceased, a member of the crew of the United States Army Tug—LT221, who perished when the vessel sank outside the port of Caglaria, Sardinia, on October 15th, 1944.

The above decedent entered the Merchant Marine in 1943 and was trained at the Marine Officers' Training School at St. Petersburg, Florida. Upon graduation from that school, he was sent to New Orleans, where he was assigned to United States Army Tug—LT221, as a civilian employee of the United States Army. He was a member of the crew of that vessel for almost one year, during which time he was promoted to Second Assistant Engineer. While in the service of this vessel, he died when the vessel exploded and sank on October 15th, 1944.

We have been informed that the vessel was navigated into a fixed mine field as it was approaching the harbor of Caglaria, Sardinia, struck a mine, and sank within two minutes with heavy loss of life.

Would you please be good enough to inform us whether a hearing was held and whether a determination was made of the cause of this accident. We would

appreciate it if you would forward to us a copy of any report or record that you might have with regard to this incident. If information can be obtained by us from another department of the Government, would you please be good enough to inform us where this information can be obtained.

We would particularly appreciate a copy of any testimony of any witnesses taken in connection with the investigations.

The purpose of this request is to determine whether Mrs. Dillehay, the widow, and her child have any claim by reason of the death of the decedent. In this connection, we direct your attention to the fact that the statute under which the claim may be prosecuted, contains a two-year limitation. The action here having occurred on October 15th, 1944, will therefore be barred unless action is taken by October 15th of this year. Mrs. Dillehay was not advised of the death until comparatively recently and, consequently, there has been limited time for investigation. Under the circumstances, will you kindly give this matter your immediate attention so that the claim on behalf of the widow and child will not be barred by the statute of limitations.

Thanking you for your cooperation, we are

Very truly yours,

FREEDMAN, LANDY & LORRY
By (S.) WILLIAM W. ALPER

WMA:JV
Air Mail

[Exhibit B to Affidavit]

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York 17, N. Y.

March 5, 1946

Mrs. Eleanor B. Dillehay
967 Maxey Street
Memphis 11, Tenn.

Dear Madam:

The claim submitted by you on behalf of Doris Ann Dillehay, minor daughter, for compensation on account of the loss on October 15, 1944, of her father, Robert Willie Dillehay, Jr., a former employee of the Army Transport Service, has been approved and an award of $17.50 per month has been made on her account, payable to you as natural guardian, until she dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she is able to support herself. No greater amount can be awarded under the law.

A check in the amount of $288.75 will go forward to you in a few days, representing compensation from October 16, 1944 to February 28, 1946, inclusive. In the future your semi-monthly checks will be for $8.75 each.

Claims for further compensation should be prepared by you on the enclosed forms CA 13 on the first of the following months: *January, April, July and October,* in accordance with the instructions on the back of the form, and forwarded to the Commission.

Checks will be mailed to you on the first and sixteenth of each month to cover the half month just past. If the status of Doris Ann Dillehay should change and a

check reaches you in payment of compensation, you should return it immediately to this office with an explanation. If claims are not forwarded by you on the foregoing dates, compensation will be suspended until the Commission has ascertained whether you are entitled to further payments. All inquiries in regard to claims or checks should be addressed to this office, and reference made to File No. X-93871.

This letter should be retained by you as evidence of the award and the instructions carefully complied with to insure prompt payments.

Very truly yours,

STEPHEN O'HEARNE,
Acting Chief of Section.

WJH:tr

[Exhibit C to Affidavit]

RECEIVED FROM the United States of America an award of Seventeen and 50/100 Dollars ($17.50) per month on account of my child, Doris Ann Dillehay, and the child of Robert Willie Dillehay, Jr., commencing October 16, 1944, under Section 10 of Public Law 267, 64th Congress, approved September 7, 1916, as amended, to continue until the child dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she becomes capable of self-support, in consideration for which I hereby release the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are or were the owners, agents, charterers, masters, officers and crews of said vessels, of each and every right or claim which I now have or may hereafter

have because of any matter or thing which happened before the signing of this paper; and particularly, but not in limitation of any of the foregoing general terms, of and from all claims arising out of or in any way connected with the death of my late husband, Robert Willie Dillehay, Jr., while he was serving as a member of the crew of the USAT LT-221.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 12 day of February, 1946.

(S.) ELEANOR B. DILLEHAY.

STATE OF TENNESSEE,
County of Shelby, City of Memphis:

On the 12th day of February, 1946, personally appeared the above named Eleanor B. Dillehay, known to me to be the person whose signature appears next above, and acknowledged the free and voluntary execution of the above release with full appreciation of its effect.

(S.) EDITH JACKSON,
Notary Public.

My Commission Expires Oct. 17, 1948.

NOTARY'S SEAL

[Exhibit D to Affidavit]

TCWTS MO—201 Dillehay, Robert W. Jr.

24 September 1946

Freedman, Landy & Lorry
906 Jefferson Building
1015 Chestnut Street
Philadelphia 7, Pennsylvania

Gentlemen:

This acknowledges receipt of your letters of 11 September 1946 addressed to this office and the Comman-

dant, United States Coast Guard, regarding the death of Robert W. Dillehay, Jr. on 15 October 1944 when the U.S. LT-221 sank at Cagliari, Sardinia.

Information available to this office shows that Mrs. Dillehay, 773 East Trigg Street, Memphis, Tennessee, was informed on 6 November 1944 that her husband, Robert W. Dillehay, Jr., was reported missing in action on 15 October 1944 in the North African Theater, and she was notified on 28 February 1945 that he was killed on 15 October 1944 at Sardinia.

The records of this office show that Mrs. Dillehay received war risk benefits amounting to $5500 in December 1945 and that her daughter is being paid compensation at the rate of $17.50 per month. Furthermore, there is on file copy of release signed by Mrs. Dillehay.

The position of a civilian seaman hired by the War Department is a civilian employee of the Government, and is not within the scope of Public Law 17, which is limited to civilian seamen who are hired through the U. S. Maritime Commission. In that situation, rights, whatever they are, must be asserted through the Federal Security Agency, Bureau of Employees' Compensation, 285 Madison Avenue, New York 17, New York.

Sincerely,

WILBUR S. ELLIOTT,
Colonel, TC,
Chief, Water Transport Service.

FFF LGV

VIG—4723
eb

[Title of Court and Cause]

LIBELANT'S ANSWER TO RESPONDENT'S MOTION TO DISMISS

[Endorsed: Filed October 17, 1947]

(1) Libellant does not have sufficient information to determine whether the LT-221 was a merchant vessel or a public vessel of the United States and therefore, denies the allegation that the vessel is a public vessel and demands due proof thereof, if material.

(2) It is admitted that Robert Willie Dillehay, Jr., was an employee of the United States and a member of the crew of the LT-221; it is denied that the libellant is precluded from suing the United States under the Public Vessels Act or under the Suits in Admiralty Act and it is alleged further, that the case of *Bradey* v. *United States*, 151 F(2d) 742, has no application to the facts in the instant case.

(3) It is admitted that an award of compensation has been made to Doris Ann Dillehay, daughter of the decedent, but it is denied that any award has been made or accepted by or on behalf of Mrs. Eleanor B. Dillehay, widow of the decedent; it is denied further, that the award of the United States to the daughter, Doris Ann Dillehay, precludes the suit against the United States by or on behalf of Eleanor B. Dillehay.

FREEDMAN, LANDY AND LORRY,
By
ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Title of Court and Cause]

LIBELANT'S ANSWER TO EXCEPTIVE ALLEGATIONS

[Endorsed: Filed October 17, 1947]

Libellant's answers to the exceptive allegations of the United States, respectfully represent as follows:

(1) It is denied that the said tug was operated as a public vessel but on the contrary, was operated as a merchant vessel of the United States.

(2) Libellant does not have sufficient information to be able to answer the second allegation and therefore denies same and demands due proof thereof, if material; it is admitted, however, that the libellant's intestate was a member of the crew of the Tug LT-221 which was owned and operated by the United States.

(3) Admitted for the purpose of this argument.

(4) Upon information and belief libellant admits that the decedent was a civilian employee of the United States; it is denied however, that he was exclusively covered by the United States Employees Compensation Act.

(5) It is admitted that an award of compensation was made by the United States Employees Compensation Commission to Doris Ann Dillehay, the minor child of the decedent. It is further averred that Eleanor B. Dillehay, widow of the decedent, would be independently entitled to the sum of $61.00 in behalf of herself under the terms of the United States Employees Compensation Act; it is further averred that said sum, however, could not be recoverable before 1952; the said Eleanor B. Dillehay has, therefore, elected to take the benefits under the general law to the exclusion of any benefits which may be accorded to her under the terms of the United States Employees Compensation Act.

(6) It is denied that Mrs. Eleanor B. Dillehay in

accepting compensation on behalf of Doris Ann Dillehay, as the natural guardian of the said minor, released the United States for all claims arising out of the death of her husband insofar as her own personal claims were concerned. On the contrary, any release entered into between the said parties, was intended to cover only the payments made on behalf of the minor child whose claim was separate and independent from that of the widow, Eleanor B. Dillehay. It is further averred that the Employees Compensation Commission by express communication, advised Mrs. Eleanor B. Dillehay that she should not obtain the services of an attorney relative to the negotiations with the Commission and in the event she needed any advice, she was advised to seek such advice from the Commission and not that of an attorney.

(7) It is admitted that Eleanor B. Dillehay received the proceeds of a policy of war risk insurance, and, it is averred further, that she received the said proceeds as the designated beneficiary under the terms of the said policy; It is averred further, that the said proceeds of war risk insurance were not paid under the terms of the Employees Compensation Act or in connection with any claim for damages and that the payment of the said proceeds has no bearing upon the issues in the instant case.

(8) It is denied that this Court does not have jurisdiction under the Suits in Admiralty Act and it is denied that the libellant's intestate was covered by the United States Employees Compensation Act and it is denied that he was precluded from suit under the Public Vessels Act; it is denied further, that a compensation award has been made by the United States to Eleanor B. Dillehay and it is averred on the contrary, that no monies whatsoever have been received

under the Compensation Act on behalf of Eleanor B. Dillehay.

FREEDMAN, LANDY & LORRY,
By ABRAHAM E. FREEDMAN,
Proctors for the Libellant.

[Title of Court and Cause]

LIBELANT'S ANSWER TO RESPONDENT'S EXCEPTIONS AND EXCEPTIVE ALLEGATIONS TO LIBEL

[Endorsed: Filed October 17, 1947]

The answers of the libellant to the exceptions of the respondent in the above entitled matter, respectfully represent as follows:

(1) It is denied that this Court has no jurisdiction under the Suits in Admiralty Act and it is denied further, that the United States Army Tug LT-221 was a public vessel; on the contrary, it is averred that the said vessel was operated as a merchant vessel and it is averred further, that this Court has jurisdiction either under the Suits in Admiralty Act, or under the Public Vessels Act.

(2) It is admitted that the libellant's intestate, Robert Willie Dillehay, Jr., was a member of the crew of the LT-221, but it is denied that the libellant is precluded from suing the United States under the Public Vessels Act, and it is denied further, that the libellant's intestate was precluded from suing the United States under the Public Vessels Act; it is denied further, that the case of *Bradey v. United States,* 151 F(2d) 742, has any application to the instant case.

(3) It is denied that any award was made to or accepted by Eleanor B. Dillehay under the United States Employees Compensation Act; it is admitted that an

award of compensation under the said Act was made and accepted on behalf of Doris Ann Dillehay, daughter of the decedent; it is denied further, that Eleanor B. Dillehay, widow of the decedent, is precluded from suit against the United States for damages resulting from the death of her husband.

FREEMAN, LANDY & LORRY,
By ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Title of Court and Cause]

OPINION OF DISTRICT COURT

Sur Respondent's Motion to Dismiss

November 21, 1947.

McGRANERY, J.:

Only one of these cases arises on a motion to dismiss. However, since they involve similar issues, they were argued, and will be considered, together. Libellant Harry Schmidt was a marine engineer employed by the Government as a member of the crew of the "Y-95," a vessel operated by the United States. Schmidt became ill and afflicted with tuberculosis while in the service of the vessel and was thereafter removed from her for hospitalization. This suit was instituted for the recovery of maintenance and cure and damages.

Samuel Mandel is suing as administrator of the estate of Robert Willie Dillehay, Jr. Decedent was a member of the crew of the Tug LT-221, and an employee of the United States, when the vessel hit a mine field off Sardinia, causing an explosion and his death. Decedent left a wife and minor child surviving him. His widow received the benefits of a war risk insurance policy and the United States Employees Compensation

Commission made an award of $17.50 per month, later increased, on a claim submitted by Mrs. Dillehay on behalf of her daughter. Mrs. Dillehay later executed a release to the United States, the effect of which is disputed. She now sues for damages.

The Government in both cases has filed exceptions to the libel, and in the Mandel case has moved to dismiss. The chief legal issue in both actions is whether a member of a crew of a public vessel who is in the employ of the United States can maintain an action against the United States under the Public Vessels Act. There is a factual question as to whether the vessels here involved are public or merchant vessels, and were the disposition of these cases to turn upon a determination of that issue, I would hesitate to make a decision on the record as it now stands. However, that fact I feel, is not controlling. Libellant in both cases claims that the Public Vessels Act was intended to subject the Government to the same sort of liability growing out of the activities of its public vessels as the Suits in Admiralty Act did concerning its merchant vessels. Therefore, since a merchant seaman employed by the Government upon a merchant vessel can sue the United States, under the latter act, it is argued that the fact that the vessels in these cases may be public vessels will not change the result.

The question at issue has not been raised frequently nor definitely decided. The Supreme Court only recently has construed the Public Vessels Act twice. In Canadian Aviator Ltd. v. United States, 324 U.S. 215, it concluded that the Act allowed suits against the Government not only for damages caused by collisions, but also for damages resulting from the negligence of its employees on a public vessel. In American Stevedores v. Porello, 330 U.S. 446 the court again rejected a narrow interpretation of the Act in holding that it allowed

suits for personal injuries as well as for property damage. However, in neither case was the injured party a Government employee or a member of the crew of the Government vessel. Other authority is similarly scanty and distinguishable. Thus, it was held that a member of a United States Navy destroyer, or of a submarine could not sue the Government under the Act. Cf. Bradey v. United States, 151 F. (2d) 742, cert. den. 326 U.S. 795; Dobson v. United States, 27 F. (2d) 807. However, the injured persons in these cases were naval personnel, not merchant seamen. In the Bradey case, the court pointed out that the existence of compensation under the United States Employees Compensation Act or Navy pension systems is ground for construing the Public Vessels Act to exclude another remedy for members of the crew of a public vessel. See Bradey v. United States, supra, at 743. However, there has been disagreement with the reasoning upon which this holding was based. See United States v. Marine, 155 F. (2d) 456, 459, where a customs inspector, covered by the Employees Compensation Act, was nevertheless allowed to sue the Government.

The Public Vessels Act provides that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States. . . ." 46 U.S.C.A. 781. The dissent in the *Porello* case has not unfairly described the majority construction of this statutory phrase as covering "personal injuries due to failure to provide proper working conditions for a longshoreman". This is analogous to the constructions apparently called for by libellant in the Mandel case and by the negligence counts in the Schmidt case. Whether or not this statutory language can properly be said to embrace a suit for maintenance and cure as well is a closer question. However, it is my belief that libellants' contentions are

substantially correct, that the Public Vessels Act and the Suits in Admiralty Act must be read *in pari materia*, and that the former was an attempt to equate the Government's liability in the operations of its merchant and public vessels. See Canadian Aviator, Ltd. v. United States, 142 F. (2d) 709, 715 (dissent, Biggs, J.); State of Maine v. United States, 45 F. Supp. 35, 37. Although, for reasons peculiar to their status, members of the armed forces should be excluded from the waiver of sovereign immunity, a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government. I feel that these suits would lie under the Suits in Admiralty Act. Cf. Dezerene v. United States, 59 F. Supp. 797; Stewart v. United States, 25 F. (2d) 869. Accordingly, therefore, the fact that these may be public vessels will not affect the jurisdiction of the court. Cf. Krey v. United States, 123 F. (2d) 1008.

The Government also claims that the remedy available under the United States Employees Compensation Act bars the libel in these two cases. However, I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here. United States v. Marine, supra. There is no question that libellant Schmidt has not received any such compensation. In the Mandel case, the effect of the release by Mrs. Dillehay for the award made to her daughter cannot be determined on the record as it now stands.

Therefore, respondent's exceptions in the Schmidt case will be stricken. The motion to dismiss in the Mandel case is denied with decision reserved on the issue of the effect of the release until further evidence is produced.

[Title of Court and Cause]

RESPONDENT'S ANSWER

[Endorsed: Filed January 23, 1948]

To the Honorable, the Judges of Said Court:

Now comes the respondent by its attorney Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and makes the following Answer to the libel in personam heretofore filed by the libellant:

1. It is denied that the United States of America, respondent herein, has by law consented to be sued herein and denies the jurisdiction of Your Honorable Court to hear and determine the matter.

2. It is admitted that at all times mentioned in the libel, the United States of America owned, operated, and controlled the Tug LT-221, but it is denied that said vessel was a merchant vessel as alleged in the libel. It is averred on the contrary that at all times mentioned in the libel, the Tug LT-221 was owned by the United States of America and was operated and controlled by the United States Army in its war operations as a public vessel of the United States.

3. Admitted. It is averred, however, that in his employment as a member of the crew of the Tug LT-221, Robert Willie Dillehay, Jr. was in fact a civilian employee of the War Department, and as such was a Civil Service employee of the United States of America.

4. It is admitted that on or about October 15, 1944, the United States Army Tug LT-221 sank while in navigable waters in the vicinity of Cagliari, Sardinia, and that Robert Willie Dillehay, Jr. lost his life. The remaining averments of Paragraph 4 of the libel are denied.

5. The averments of Paragraph 5 of the libel are de-

nied, as are also the averments in subdivisions (a) to (j) inclusive.

6. The averments of Paragraph 6 of the libel are denied.

7. The averments of Paragraph 7 of the libel are denied.

8. The averments of Paragraph 8 of the libel are admitted, but it is denied that such averments are material.

9. The averments of Paragraph 9 of the libel are admitted.

10. The averments of Paragraph 10 of the libel are admitted.

11. The averments of Paragraph 11 of the libel are denied. The respondent denies the right of the libellant to bring and maintain this or any other suit against the United States for or on behalf of Eleanor B. Dillehay and Doris Ann Dillehay. The respondent further denies that the libellant is entitled to recover the amount claimed herein, or any other amount by reason of the death of Robert Willie Dillehay, Jr.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, THE RESPONDENT AVERS:

12. That by the Act of September 7, 1916, as amended, known as the United States Employees Compensation Act (5 U.S.C. 751 et seq.), Congress has provided for the payment of compensation for disability of employees of the United States resulting from personal injury sustained in the performance of duty and has provided for compensation benefits to certain classes of dependents of such employee in cases of death occurring in the performance of duty.

13. That Robert Willie Dillehay, Jr., libellant's intestate, as a member of the crew of the United States

Army Tug LT-221 was an employee of the United States through its War Department and was engaged in the performance of his duty as such employee at the time he met his death, within the meaning of the Act of Congress mentioned above.

14. That libellant's full and complete remedy is by way of compensation under the provisions of the United States Employees Compensation Act, as aforesaid, and that Congress having thereby provided relief for persons in the position of libellant, libellant is thereby barred from any other remedy or recovery against the United States in a suit or proceeding in admiralty or otherwise, and has no cause of action against the United States for the occurrence alleged in the libel, and no legal right or standing to maintain this libel or proceeding. The remedy under the United States Employees Compensation Act is exclusive.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, RESPONDENT AVERS:

15. That upon the application and claim of decedent's widow, Eleanor B. Dillehay, the United States Employees Compensation Commission made an award of $17.50 per month for Doris Ann Dillehay, decedent's minor daughter. On January 31, 1947 the United States Employees Compensation Commission increased the award to Doris Ann Dillehay, decedent's minor daughter, to $43.75 a month for the reason that the decedent's widow Eleanor B. Dillehay had remarried, and the minor thereby became entitled to 25% of the statutory maximum wage per month rather than 10% of such maximum wage upon which the award was originally based. It is averred that the making and acceptance of such award constituted an election, and that libellant is, therefore, barred from

bringing and maintaining any suit against the United States arising out of the death of Robert Willie Dillehay, Jr. on behalf of Doris Ann Dillehay.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, RESPONDENT AVERS:

16. That on February 12, 1946, in consideration of the award made by the United States Employees Compensation Commission to Doris Ann Dillehay, the decedent's widow, Eleanor B. Dillehay, executed a release to the United States of America releasing "the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are or were the owners, agents, charterers, masters, officers and crews of said vessels, of each and every right or claim which I now have or may hereafter have because of any matter or thing which happened before the signing of this paper; * * * of and from all claims arising out of or in any way connected with the death of my late husband, Robert Willie Dillehay, Jr., while he was serving as a member of the crew of the USAT LT-221." By reason of such release the libellant is without right to bring and maintain an action against the United States or any of its agencies or instrumentalities on behalf of Eleanor B. Dillehay, for any claims arising out of or in any way connected with the death of Robert Willie Dillehay, Jr.

WHEREFORE, Respondent denies that libellant is entitled to claim the sum of $150,000.00 as alleged in the libel, or for any other amount whatsoever; and prays Your Honorable Court that the libel here be dismissed with costs assessed against the libellant, and for such

other and further relief as the justice of the cause may require.

GERALD A. GLEESON,
United States Attorney,
Attorney for Respondent.

[Verification Omitted]

[Title of Court and Cause]

LIBELANT'S INTERROGATORIES TO BE ANSWERED BY THE RESPONDENT

[Endorsed: Filed February 3, 1948]

1. State all the facts relating to the alleged accident and/or injuries and death of plaintiff's decedent and his claim for damages as to which you and your underwriters have obtained information through witnesses, agents or other representatives.

2. Identify all reports, communications, memoranda (oral or written) by date; the nature thereof; the name, address and job classification of the person making or rendering same and of the person or agency (governmental or otherwise) to whom directed. Identify all witnesses by name, address, rating or job classification together with the name and address of their employer.

3 Attach hereto true and correct copies of all written statements (signed or unsigned) from any and all persons, including the libellant or the decedent, who purport to be witnesses or have any knowledge regarding the said accident and/or injuries or death or any matter connected therewith or related thereto, including statements taken by the Federal Bureau of Investigation or any other governmental agency. Attach hereto true copies of memoranda of any oral state-

ments which the United States of America or its representatives have obtained or received from any such person.

4. Attach hereto true and correct copies of all log book entries covering the period of the alleged explosion and marine disaster on the pier prior to and following that time (rough, smooth, official, engine room, bridge, medical, etc.), injury and death reports, and any other reports and communications relating to the said explosion, marine disaster and/or death.

5. State whether the libellant or the decedent made any statement or report to you or your representatives orally or in writing, and if so, attach a true copy of the same or memorandum thereof.

6. State whether the libellant's decedent was submitted to any physical or medical examination before or during the course of the voyage in question, and, if so, set forth in detail the results of such examination and attach true copies of all reports from any sources in connection therewith.

7. State the present location and the name, address and job classification of the person having custody of the shipping articles and payroll records covering the voyage in question and of the statements, log books, reports, communications and memoranda referred to hereinabove, identifying the same with particularity, and state the name and address of his employer.

FREEDMAN, LANDY AND LORRY
By WILLIAM M. ALPER,
Proctors for Libellant.

[Title of Court and Cause]

RESPONDENT'S ANSWERS TO INTERROGATORIES

[Endorsed: Filed September 16, 1948]

The answers of the United States of America, respondent herein, to the interrogatories propounded by the libelant in this cause are as follows:

1. The facts relating to the alleged accident, injuries and death of libelant's decedent and his claim for damages are as follows:

Libelant's decedent, Robert Willie Dillehay, Jr., appears to have drowned on October 15, 1944, when the U.S. Army Tug LT-221 struck a mine at 0950 hours in the Gulf of Cagliari at a point in the vicinity of 38° 18½′ N. by 9° 15′ E. and sank in less than two minutes. She was a total loss and 13 members of her total company of 27 were missing and presumably drowned, including libelant's decedent. Between 0900 and 1000 hours the sea in the Gulf of Cagliari was calm, visibility was good, and the wind was from the northwest, fresh, with a velocity of force 3. The LT-221 had departed Marseilles, France, at 0800 hours October 13, 1944. About 1800 hours on October 14, 1944, the LT-221 arrived off Cape Spartivento, Sardinia. She stayed off the Gulf of Cagliari until the morning of October 15, 1944, traveling during the night at a reduced speed on a due east course until she reached a point south of the eastern extremity of the Gulf. She approached the entrance of the eastern swept channel into the Gulf of Cagliari at about 0730 hours October 15, 1944. Her Master, Ernest A. Hambacher, was familiar with the various landmarks as a result of having negotiated the swept channel in question on at least three previous occasions, to-wit, August 15, 1944, August 16, 1944, and September 18, 1944. He made a fix of his position off

Cape Finocchio at 0900 hours as identified by the visible wreckage there and determined that at her then speed of 11 knots she would arrive at the buoy where she should turn left at about 0930 hours. About 0930 the bouy was sighted and the LT-221 swung left to 257° true. The navigation of the LT-221 was confirmed by the fact that she had been following a Liberty ship which had made a similar left turn and taken a course to the west. When the LT-221 was at the buoy the Liberty was opposite Cape Santa Elia, about to make a right turn into the Port of Cagliari. The LT-221 continued on her course toward the point where the Liberty was making its turn around Cape Santa Elia for about 15 or 20 minutes, when there was a terrific explosion and the tug sank.

Libelant's decedent, Robert Willie Dillehay, Jr., age 22, was a civil service employee of the War Department, Transportation Corps, New Orleans Port of Embarkation, serving as Third Assistant Engineer aboard the LT-221. At the time of his death his pay was $2,200 per annum plus subsistence and quarters valued at $540, plus a bonus of $183.33, or a monthly wage of $411.66 for purposes of computing compensation. His life was also insured by the United States under the Second Seaman's form of War Risk Insurance Policy in the amount of $5,500, under which Eleanor B. Dillehay, widow of the decedent, was designated beneficiary, and payment of the $5,500 benefit was made by the United States in due course.

Claim for compensation on account of decedent's death was filed with the Bureau of Employees' Compensation, Federal Security Agency, on Form CA-5, by Eleanor B. Dillehay, born November 11, 1921, as the widow of the decedent on her own behalf and on behalf of Doris Ann Dillehay, born February 13, 1943, the minor daughter of the decedent. Claim was received

on May 3, 1945, within one year of the death. On April 3, 1946, the Bureau of Employees' Compensation determined that Eleanor B.. Dillehay would not be eligible to receive United States Employees' Compensation on her own account by reason of the provisions of Article 25 of the Second Seaman's War Risk Policy, providing that recoveries from the United States should not be cumulative, until the amount otherwise payable as such compensation should exceed the $5,500 proceeds of the war risk insurance benefits which she had received; that Doris Ann Dillehay had received no benefit of the war risk insurance and that in consideration of the award made to Eleanor B. Dillehay as the natural guardian on behalf of the minor daughter of herself and the decedent, she execute before a notary public and submit a release of all demands against the United States of America and all its departments and agents, which is now on file. The Bureau accordingly awarded compensation for the death of the said Robert Willie Dillehay, Jr., to be paid to the widow on behalf of the minor daughter of the decedent, subject to modification in accordance with the provisions of Section 10 of the Act as follows: "10% of the maximum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or if over eighteen and incapable of self-support on account of some mental or physical disability until becoming capable of self-support." Thereafter, on February 2, 1947, the Bureau of Employees' Compensation modified its award pursuant to a determination that Eleanor B. Dillehay had remarried on February 14, 1946, that the compensation otherwise payable to Eleanor B. Dillehay on her own account from October 16, 1944, to February 13, 1946, inclusive, was less than the war risk insurance which she received from the War Shipping Administration; that she would therefore at no time

be eligible to receive any compensation on her own account as a widow. The Bureau accordingly modified the previous award and awarded compensation commencing February 14, 1946, to be paid to Eleanor B. McNamee, formerly Eleanor B. Dillehay, as the natural guardian of Doris Ann Dillehay, decedent's daughter, subject to modification in accordance with Section 10 of the Act as follows: "25% of the maximum wage, $175.00, or $43.75 per month until she dies, marries, reaches the age of eighteen, or if over eighteen and incapable of self-support, becomes capable of self-support." Payments of said amounts of compensation under said award and modified award were made and accepted in accordance therewith.

2(a). Except for the Report of the Army Board of Investigation into the sinking of the U. S. Army Tug LT-221, the identity of all reports, communications, memoranda (oral or written) by date; the nature thereof; the name, address and job classification of the person making or rendering the same and of the person or agency (governmental or otherwise) to whom directed are as indicated by the copies attached. The Report of said Board of Investigation is in the possession of The Honorable, The Secretary of the Army, Washington 25, D. C., and is a privilege document the contents of which may not be divulged.

2(b). The names, ratings and record addresses of the witnesses, all of whom were employees of the United States, are as follows:

Name	Rating	Address
Hunley, J. W.	Commanding Officer, *SS Ethelbert Nevin*	
Hambacher, Ernest A.	Master	120 Oak Hill Avenue, Long Branch, New Jersey
Thibodeau, Warren J.	1st Officer	198 Falcon Street, Boston, Massachusetts
Doyle, William G.	1st Engineer	35 Cottage Street, Watertown, Massachusetts
Louis, Walter P.	2nd Asst. Engineer	Route 1 Box 23, Deridder, Louisiana

Guice, James W.	Oiler	77 Jackson Avenue, Ocean Springs, Mississippi
McGinty, Berton E.	Fireman	Ocean Springs, Mississippi
Neumann, Lee A.	Acting Fireman	Box 582, Weslaco, Texas
Dimsdale, Delma D.	A.B. Seaman	Route 5, Covington, Georgia
Measles, Richard M.	A.B. Seaman	1816 Dumoine Street, New Orleans, Louisiana
Frankenhauser, Elvin A.	A.B. Seaman	Route 1, Gonzales, Texas
Elkin, George F.	Ordinary Seaman	214 East Second Street, Oswego, New York
O'Connell, Daniel J.	Ordinary Seaman	1050 West 79th Street, Chicago, Illinois
Linker, Charles W.	Chief Motor Machinists' Mate	U. S. Navy, LST 551, U. S. Naval Amphibian Force
Jones, William R.	Technician 4th Grade	Ships Complement Detachment, Jackson Barracks, New Orleans, Louisiana
Way, Robert L.	Lt., USNR	U. S. Naval Detachment, Cagliari, Sardinia
Johnson, Carl C.	Lt., USNR	U. S. Naval Detachment, Cagliari, Sardinia
Price, E. G.	Flight Officer	251 Air Sea Rescue, R.A.F., Cagliari, Sardinia
Walser, Henry R.	Lt. (jg), USNR	YWS 179 (Mine-sweeper), Cagliari, Sardinia

3. Except for the Report of the Army Board of Investigation referred to above, there are attached copies of all written statements, and memoranda of oral statements so far as known of persons who purport to be witnesses or to have knowledge relating in any manner to the accident, injuries or death, obtained by the respondent or its representatives.

4. The present whereabouts of the log books, if they survived the explosion and sinking, is not known. Copies of all other reports except for the Army Board of Investigation referred to above are attached so far as known.

5. Copies of all statements and reports by libelant or decedent and their representatives are attached so far as known.

6. No report of physical and medical examination relevant to the death of libelant's decedent or his physical condition at or about that time has been found.

7. The present location and identity of the persons having custody of the records and documents referred

to are The Honorable, The Secretary of the Army, Washington 25, D. C., and The Comptroller General of the United States, Washington 25, D. C..

GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent.

[Verification Omitted]

[Title of Court and Cause]

LIBELANT'S MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS FOR INSPECTION PURSUANT TO RULE THIRTY-TWO

[Endorsed: Filed November 4, 1948]

Libelant above-named, by his proctors, Messrs. Freedman, Landy and Lorry, moves this Honorable Court to compel the respondent to produce the following papers and documents for inspection and copying:

(a) The Report of the Army Board of Investigation into the sinking of the Tug LT-221, including the notes of testimony of all witnesses taken in connection with the said investigation.

In support of this motion, libellant avers the following:

1. The within cause is an action to recover damages for the wrongful death of the decedent, a seaman, on board the Tug LT-221 on October 15, 1944, when the said vessel struck one or more mines and exploded near the port of Cagliari, Sardinia.

2. By reason of the nature of the disaster, libellant has practically no knowledge of the exact causes of this marine disaster and the exact and detailed facts relat-

ing thereto, and relating to the issues of the unseaworthiness of the vessel and the respondent's negligence, which were the proximate causes of this disaster and libellant's injuries.

3. The United States of America, through the United States Army and other representatives, has made extensive investigation of the causes of this disaster, some of which took place in Italy or Sardinia immediately following the disaster.

4. By reason of the immediate investigation made by the United States Army and other representatives of the respondent, the United States of America has come into possession of all of the books, papers, documents, maps and notes of testimony set forth in paragraph (a) supra.

5. Respondent has failed to attach copies of the foregoing to its answer to the interrogatories propounded by libellant.

6. Libellant's counsel has written numerous letters to the members of the crew of this vessel and to various agencies and parties who might have knowledge of the facts, or might have possession of the documents set forth above, but has received replies from only a few members of the crew, none of which contain facts relating to the courses of the vessel, the existence of minefields and information relating thereto, and other similar information, all relevant to the determination of the respondent's liability in this cause.

7. The aforesaid report and notes of testimony are not privileged in any way.

8. The production and inspection of documents sought herein is necessary for the proper preparation of the libellant's case for trial, not only to obtain information vital to the factual issues involved, but to afford him information for use in cross-examining and impeaching witnesses that will be called by the respond-

ent, to obtain information as to the existence or location of relevant facts, and because the witnesses can be reached by the libellant, if at all, with the greatest difficulty, as has been set forth above.

WHEREFORE, libellant prays this Honorable Court to require the respondent to produce the above papers and documents for inspection and copying within days from the date hereof.

FREEDMAN, LANDY AND LORRY,
By WILLIAM M. ALPER,
Proctors for Libellant.

TRANSCRIPT OF HEARING ON MOTION TO COMPEL RESPONDENT TO PRODUCE TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION HELD JANUARY 3, 1950.

[Title of Court and Cause]

Philadelphia, Pa., January 3, 1950.

Before HON. WILLIAM H. KIRKPATRICK, J.

PRESENT: FREEDMAN, LANDY, AND LORRY, ESQ., by ABRAHAM E. FREEDMAN, ESQ., and
WILLIAM M. ALPER, ESQ., representing Libellant.
GERALD A. GLEESON, ESQ., United States Attorney, by JAMES P. MCCORMICK, ESQ., Assistant United States Attorney, and the DEPARTMENT OF JUSTICE, by PATRICK F. COONEY, ESQ., representing Respondent.

[Endorsed: Filed January 12, 1950]

DISCUSSION

Mr. FREEDMAN: If the Court please, this is an application under Rule 34 to compel the production of cer-

tain documents in the custody and possession of the Respondent, the United States. In this situation a tug named the LT 221 on October 15, 1944, was entering the harbor of Cagliari, Sardinia, when it encountered an explosion and foundered and resulted in a number of deaths, included among which was the decedent involved in this case.

An investigation was conducted by the Army—I believe it was the Army Board of Inquiry—and we filed a series of interrogatories which were answered, and I will say something about that in a minute. The answers to the interrogatories disclosed all of the information, except that which was obtained in connection with this investigation by the Army Board of Inquiry. They gave us the names of witnesses. There were some 28, I believe, or 35 personnel on this tugboat. We have sent out about—I think it was 28, wasn't it?

MR. ALPER: 27, 13 of whom died.

MR. FREEDMAN: Twenty-seven or twenty-eight members of the crew. There were about twenty-seven or twenty-eight members of the crew, of whom thirteen died, and we sent out about 30 letters and got about four replies, which were not entirely negative but which did not disclose any real information concerning the circumstances of the foundering, didn't give us any facts at all so far as the cause of action here involved is concerned.

We now make application for the production of those statements, that is, the investigation conducted by the Army Board of Inquiry, and we would like to file with Your Honor an affidavit showing good cause. We gave a copy of this a few minutes ago to Mr. Cooney and to Mr. McCormick.

THE COURT: The suit is in admiralty, I presume.

MR. FREEDMAN: Yes, sir, Your Honor.

THE COURT: And is this an application under Rule 31 or 32?

Mr. FREEDMAN: This is an application under Rule 32. I said 34 before. That was an error before, Your Honor.

THE COURT: I mean, it is the same as 32.

Mr. FREEDMAN: Yes, sir, Rule 32 in admiralty, which requires a showing in good cause.

Now, the basis for our complaint, Your Honor, the good cause which we allege, is that we have tried to get in touch with the witnesses, without any success at all.

THE COURT: Do you have the opinion of the Alltmont case?

Mr. FREEDMAN: We didn't get any replies at all from the Master or one or two other key witnesses, so to speak. The Master, who is perhaps the most important witness now, refuses to give us any reply at all.

THE COURT: Are the facts you are now stating in your affidavit?

Mr. ALPER: That is right, they are in the affidavit.

Mr. FREEDMAN: And in addition to not being able to obtain the real, relevant and pertinent information, it strikes us, Your Honor, from a reading of the answers to the interrogatories, that they are more or less a summary of the facts and not a detailed statement of the facts themselves, and that, sir, is where I think our biggest complaint lies. I think we are entitled to a copy—not a copy—we are not entitled to a copy of the statements themselves in view of the recent decision in the Alltmont-O'Neill cases, but I do believe that we are entitled to a complete detailed account or else all of the information which they have from any source, regardless of the nature of the source. I think they must disclose to us every fact within their knowl-

edge and within their possession, regardless of how they got it.

Now, the answers to the interrogatories here don't give us any detailed account of the facts so that we can draw our own conclusions; they more or less give us a summary of what they believed happened, namely, that the vessel was proceeding in the mine-swept channel following another vessel and then suddenly it encountered this explosion. They do not give us the courses which were taken, the location of the mine fields, and all of the other relevant data which would have enabled us to draw our own conclusions and draw our own inferences and determine whether or not there is a cause of action.

THE COURT: Well, where are the answers?

Mr. FREEDMAN: The answers to the interrogatories?

Mr. ALPER: They should be in the record there.

Mr. FREEDMAN: Does Your Honor have a copy?

THE COURT: Well, I have the whole record here. I haven't located anything yet. Well, here are the Libelant's interrogatories that were filed February 3, 1948. Are those the ones you mean?

Mr. ALPER: I believe so.

THE COURT: Now, when were they answered?

Mr. FREEDMAN: We have got a copy of the answer here, but I don't have the date that they were answered.

Mr. ALPER: They were answered on September 17, 1948; they were filed on February 3, 1948.

Mr. FREEDMAN: February 3, 1949, you mean.

Mr. ALPER: 1948.

THE COURT: The answers were not.

Mr. ALPER: The interrogatories were filed September 17, 1948.

Mr. FREEDMAN: The interrogatories were filed on

February 3, 1948, and the answers were filed on September 17, 1948.

THE COURT: Well, I don't have the answers.

Mr. ALPER: Here is a carbon.

THE COURT: Well, all right.

Mr. FREEDMAN: Now, sir, as I said before, we allege good cause upon the basis of the fact that we are unable to obtain the information directly from the witnesses for the reasons stated, but even more important than that is the fact that in answer to interrogatories they should have given us a detailed statement of the facts which they had, the information which they have elicited from any source, and that they have not done; they have given us a summary and what appears to be an edited version of the facts which they have in their possession.

THE COURT: Well, in other words, you want the statements of the witnesses?

Mr. FREEDMAN: Well, I know we can't get the statements of the witnesses in view of the Alltmont-O'Neill decision, but we believe we are entitled, sir, to all of the information, every bit of information which is contained in those statements.

THE COURT: Do you think the Alltmont decision puts you out of Court on the matter of good cause?

Mr. FREEDMAN: Oh, I thought you meant—I will take that last statement out.

THE COURT: You cannot get copies.

Mr. FREEDMAN: We want the statements of the witnesses themselves, yes, sir. I thought Your Honor meant in answer to our interrogatories. We weren't entitled to the statements in answer to the interrogatories, although we were entitled to all of the information.

THE COURT: Yes.

Mr. FREEDMAN: We now want the statements themselves.

THE COURT: You don't concede that what Judge Maris said in the last paragraph puts you out of Court on that?

Mr. FREEDMAN: No, sir. Oh, no. No, I think that Judge Maris made it clear there that upon a showing of good cause we are entitled to copies of the statements—not copies, but the originals themselves.

THE COURT: "Since the Libellants have been furnished, through the Respondent's answers to the interrogatories, with the names and addresses of the persons who made the statements in question and are, therefore, in a position to interview them themselves, if they have not already done so, it is quite possible that the Libellants will be able to show such special circumstances in this case as would justify production of the statements in question."

Now, the only thing is you say that you are not in a position to interview them because they——

Mr. FREEDMAN: We tried, sir, to contact them, without success. As I said, we heard from four men who knew very little about it.

THE COURT: How many did you write to?

Mr. FREEDMAN: I think all in all we sent out about 35 letters, and I think we wrote to every one of the witnesses whose names were furnished to us in the answers to interrogatories.

Mr. MCCORMICK: I think Judge Maris' decision puts him out of Court after that, the mere fact that they had been given the names and addresses of the witnesses. The mere fact that the witnesses won't answer their letters doesn't throw upon the Respondent the burden of furnishing their statements.

THE COURT: Well, what is good cause?

Mr. MCCORMICK: Good cause may be that the wit-

nesses are not available, they can't be subpoenaed and they can't be interrogated, or their deposition taken.

THE COURT: Suppose you have their statement and the witnesses don't answer Mr. Freedman's letters. Suppose you know exactly what the witness said and you have a complete statement, and the witness simply says or writes to Mr. Freedman and says, "I won't give you any information."

Mr. MCCORMICK: Mr. Freedman has access to them with a subpoena to take their depositions.

THE COURT: Surely.

Mr. MCCORMICK: Consequently, what he has shown is inconvenience and not good cause. Under Judge Maris' decision I don't think inconvenience in getting witnesses' statements is sufficient to show good cause.

Mr. FREEDMAN: It amounts to a greater——

THE COURT: It is a pretty tough proposition on a plaintiff who hasn't got the resources to travel all over the country or send his counsel all over the country where you get a situation like this.

Mr. FREEDMAN: In addition to that, sir, I may say that many of the witnesses are U. S. Navy personnel, with no address given, and some are British Navy men with no addresses.

THE COURT: Let me see those answers.

Mr. AIPER: Third page.

THE COURT: I notice that you have given a list of witnesses here. Just to take the residences, they are given here as follows: New Jersey, Massachusetts, Massachusetts, Louisiana, Mississippi, Mississippi, Texas, Georgia, Louisiana, Texas, New York, Illinois; U. S. Naval Amphibian Forces, Jackson Barracks, Louisiana; Cagliari, Sardinia; Cagliari, Sardinia—all these are Navy personnel—Cagliari, Sardinia—there are four of those. One of them is British.

All right, go ahead.

Mr. COONEY: I think Mr. Freedman said that the main one he was interested in, the principal witness, was the Master. No effort has been made to take his deposition.

Mr. FREEDMAN: We are interested in all of them. We said the Master is one of the key ones. He is the Master; he is the key witness.

THE COURT: Where is the Master located? Is he in this list?

Mr. FREEDMAN: I think he lives somewhere in New Jersey; doesn't he?

Mr. COONEY: That is right.

THE COURT: What?

Mr. COONEY: He lives in New Jersey, I believe.

THE COURT: Oh, yes, Hambacker, Oak Hill Avenue, Long Branch, New Jersey.

What have you done about the Master?

Mr. FREEDMAN: We have written to him. Have you got copies of the letter?

Mr. ALPER: Well, I can state it. We wrote to him. He wrote back and said that he was very sorry about the incident, and that all he could say was that the ship hit a mine, as far as he could tell. And then we wrote back and asked him detailed questions, going into all the issues that are important in the case, and he replied to that letter by saying that in view of the fact that this was an Army tugboat and that he hadn't been released from wartime secrecy, he didn't feel that he could give us the details that we asked him for, but that he would write to the United States Army, and we heard no more from him.

Now, we then wrote to the War Department and told the War Department his position and asked the War Department whether or not in view of the fact that the war was over they would release him from secrecy, and we got a reply from them saying that they would re-

lease him from secrecy, and we so wrote him, and we haven't heard from him. He still doesn't want to talk.

Mr. COONEY: I think, really, that could be explored further.

THE COURT: What?

Mr. COONEY: I think that——

Mr. ALPER: As soon as we got down to details why he made claim to secrecy.

Mr. COONEY: You could compel him to testify under subpoena.

THE COURT: Of course, his deposition can be taken without too much difficulty, but he is only one.

Mr. FREEDMAN: Even so, we have got to make this distinction; it is all right to say that we can take his deposition, and even subpoena him possibly for the Court here if it is not more than a hundred miles, but if we don't know what negligence we have and if we ourselves don't know the real basis or the real cause for the explosion, it seems to me, sir, to be a useless gesture just to call him and take his deposition, unless he will cooperate with us and really tell us all that he knows about it.

Now, he has told the Government. He has testified at the Government inquiry and he has made a number of disclosures which apparently are very relevant and which they don't see fit to turn over to us. Now, we could ask him—we do not know about it—and he could answer the question in a sentence or two sentences telling us virtually nothing; on the other hand, if he really wants to cooperate and tell us all that he knows he can probably give us all of the information which could be useful in just testing whether or not there was any negligence on the part of the defendant or any unseaworthiness of the vessel which in any way contributed to this accident.

Now, this is a discovery proceeding, Your Honor, as

I said, and unless you have got a witness who will cooperate, then it seems to me that taking his deposition isn't the complete answer to it. It is not at all a satisfactory matter.

THE COURT: Well, suppose I agree with all you say, as it might be inferred that I do, nevertheless I am bound by the Court of Appeals' decision. What am I going to do about it? Judge Maris says it in so many words. Maybe he doesn't want to say it positively. Maybe if you are in a position to interview these people, or any of them, then it is quite possible that you won't be able to show special circumstances. Now, take the Master. He is one example. I suppose you would have to deal with the witnesses separately. Here is a man that you can interview. You are in a position to interview him.

Mr. FREEDMAN: Well, we have tried, sir.

THE COURT: Well, you have written to him.

Mr. FREEDMAN: And he won't talk to us, and certainly he has given an indication of hostility toward us and a non-cooperative attitude, which makes it quite clear that he is not going to tell us anything if he doesn't have to. Now, unless we know what it is that we are after, we can't make him tell us. Now, the only way we can find out is to get the statements which have previously been made. This is a discovery proceeding. If we can't get a complete recitation of all of the facts in answers to interrogatories, the only answer, sir, is the production of the statements themselves.

THE COURT: Of course, you are only repeating what I have said on numerous occasions, but——

Mr. FREEDMAN: I know, sir, and while to a certain extent the Court of Appeals in the Alltmont-O'Neill case might have overruled Your Honor's decision in the DeBruce and other cases, nevertheless I think the Court has made it clear that in answers to our inter-

rogatories they have got to give us all of the facts, not edited or paraphrased or cut down or summarized; they have got to give us all of the facts, the unvarnished facts. Now, if we can't get that——

THE COURT: The only way they can do it is by giving you the statements. You either get the edited statements or they give you the statements.

Mr. FREEDMAN: That is right.

THE COURT: There is no intermediate ground. If they don't give you the statements, what they give you is an edited edition of the statements or a paraphrased edition.

Mr. FREEDMAN: Well, that is what would seem to be the consideration here, and the paraphrased edition that we have doesn't give any comfort at all, doesn't really tell what happened. Now, if we had the unvarnished facts, the bare, plain facts of the witnesses——

THE COURT: That is what the Court of Appeals says you should have; it says you can't get any more than that. They had all the arguments before them and they decided that that was the kind of discovery that they wanted. Those arguments were all before them. Is there anything else anybody else wants to say?

Mr. COONEY: The only thing is he raised some questions as to the answers he received in the interrogatories not being complete. I think Your Honor made about the best answer to that, but also I believe that he has been given as complete a story as possible in those interrogatories and in the documents filed with them. I also feel that we should be given an opportunity to answer this affidavit which was really not filed at the time the motion was filed.

THE COURT: I don't know what it says. I haven't read it yet. I will have to take counsel's statement for it.

Mr. COONEY: It does not show good cause in that the——

Mr. FREEDMAN: Mr. Cooney, may I ask a question?

Mr. COONEY: Surely.

Mr. FREEDMAN? Have you given us every fact, every bit of information which is relevant to these proceedings in the answers to the interrogatories?

Mr. COONEY: I think so. Now, part of the difficulty may be with the form of the interrogatories themselves. Maybe if the interrogatories were more detailed and explicit as to exactly what you want there would be much less opportunity for these type of arguments arising as to whether it is everything, which I think it is, but I think that is part of the problem of getting more detailed and more explicit interrogatories.

THE COURT: Well, his real problem is that he can't frame the kind of explicit interrogatories he wants, unless he has talked to the witnesses, and the witnesses don't talk to him or don't answer his letters, or whatever it is. Unless he can get the statements that they gave you he doesn't know how to frame explicit interrogatories.

Suppose there is some defective piece of machinery on the ship. He doesn't know what it is. He can't be explicit about it. He can say, "Was there any defect in the ship's machinery?" or something like that. I suppose it is the best he can do, but he would be a darn sight better off if he could say, "Was the third pipe from the boiler on the port side rusted through?"

Mr. COONEY: It may not be necessary to go into that in complete detail, but for a sample I was just looking at this affidavit here, and it says, "The location of the aforesaid mine fields, the location and the course of the free channel, exact course and headings of the channel, what type of mine was struck, whether its degaussing apparatus was in use." I mean, they are the type of

questions that could, I think, be asked directly in the interrogatories, and that should relieve his mind as to whether——

Mr. FREEDMAN: Well, let me ask you this, Mr. Cooney. Our first interrogatory, which has been approved after a considerable conference with all of the bar here, was more or less drafted by Respondents and Libellant's counsel with the approval of the Court—I think I am correct in that, am I not, Your Honor?

THE COURT: I think it was so, yes.

Mr. FREEDMAN: And that requires you to state all of the facts that you know about that are relevant in these proceedings. Now, what I would like to know from you is whether or not you have given us all of the facts.

Mr. COONEY: Yes, in the answers to the interrogatories.

Mr. FREEDMAN: In the answers to the interrogatories?

Mr. COONEY: Except——

Mr. FREEDMAN: Except what, Mr. Cooney?

Mr. COONEY: No, we have given you all the facts. We have not given you the statements of the witnesses before the Army Board of Investigation.

Mr. FREEDMAN: Well, I don't want to play with words, Mr. Cooney, but what I am asking you now is whether you have given us all the facts, and that means the facts which are in those statements as well as any place else.

THE COURT: That is right, facts—he is not talking about the statements. Have you given the facts that were given you by the witnesses before the Army Board of Investigation?

Mr. COONEY: Yes, sir, but before we go into this further, there is a point that I wanted to make. That is that this petition was filed today and we received a copy today.

Mr. FREEDMAN: You mean the affidavit?

Mr. COONEY: The affidavit, rather. And on this information, for example, the exactness and all, I think it would be best put if it is gone into in an affidavit in answer to this, which we should really have an opportunity to answer the affidavit with a motion under the Rules.

THE COURT: No, but I would like to know what the status of the case is. Now, you had an Army Board investigation and all the witnesses made statements at that time, and undoubtedly those statements disclosed certain facts. They dealt with facts and they told you. Now, have you in the answers to interrogatories given all the facts which the witnesses at the Army Board investigation disclosed? That is a fair question. I want to know where we stand. Or have you felt that under your privilege you could withhold certain facts, not copies of the statements, but certain facts because they were obtained in statements from witnesses called before the Army Board? Do I make myself clear, Mr. Cooney?

Mr. COONEY: Yes, I would say in answer to interrogatories, facts that were developed at the Board of Investigation, without necessarily being identified with the particular witness who gave them, or opinions of particular witnesses.

THE COURT: That is what I mean, yes.

Mr. COONEY: They are set forth in the interrogatories.

THE COURT: They are all set forth?

Mr. COONEY: Yes, sir.

THE COURT: Well, all right.

Mr. COONEY: But I would like——

Mr. FREEDMAN: I take it that you have given us every fact?

THE COURT: That is what he says. That is what I

understand him to say, that he has given every relevant fact, no matter where it was.

Mr. COONEY: Since these particular interrogatories —I would like, possibly, an opportunity to review them and actually check the data.

THE COURT: Oh, yes. You haven't actually seen the affidavit. I don't want to rush you.

Mr. FREEDMAN: But it is clear that you in your answers to the interrogatories have given us every fact which you knew about which you obtained from this Army Board of Inquiry or from any other source? That is clear now as far as we are concerned?

THE COURT: That is what he said.

Mr. COONEY: That is as distinguished from opinions, and so forth.

THE COURT: I understand. That is what I meant. Now, what do you want me to do?

Mr. FREEDMAN: And we would like Your Honor to enter an order, sir——

THE COURT: I know, but if he wants to answer your affidavit he is entitled to it.

Mr. FREEDMAN: Oh, yes.

THE COURT: If that is what you want.

Mr. COONEY: That is the first thing we want.

THE COURT: Well, all right, I will certainly give you an opportunity to do that.

Mr. COONEY: Because we received the affidavit today. We would also like an opportunity to file a brief.

THE COURT: That is what I mean. If you want to file an affidavit, that is all right, and if you want to file a memorandum with it, it is all right.

[Verification Omitted]

[Title of Court and Cause]

RESPONDENT'S AFFIDAVIT IN OPPOSITION TO THE MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed January 12, 1950]

WASHINGTON,
District of Columbia, ss:

Patrick F. Cooney, being duly sworn, deposes and says that he is an attorney in the Admiralty and Shipping Section of the Department of Justice and has been charged with the general handling of this case; that the matter is being handled by the United States Attorney's office in Philadelphia under the directions of the Department of Justice in Washington, and that all papers and documents are in the possession of the Department of Justice in Washington; and that the following statements, upon information and belief, are based upon investigations, files, and documents in the possession of the Department of Justice:

(1) This affidavit is filed in answer to an affidavit by proctor for libelant and in opposition to libelant's motion in the instant case seeking to compel respondent to produce the confidential proceedings of an Army Board of Investigation into the sinking of the tug LT-221 on October 15, 1944. The issue is whether libelant by a motion for discovery can obtain the confidential proceedings of the Army Board of Investigation and whether the affidavit of proctor for libelant, filed January 3, 1950, in support of the motion, shows good cause.

(2) The claim of privilege is asserted since the Army investigation was directed at discipline and the efficiency of the armed service during time of war, and the witnesses testified under service regulations of confidence and security.

(3) Good cause for the discovery has not been shown in that libelant has been furnished, through respondent's answers to interrogatories, with the names and addresses of the persons who made the statements to the Army Board of Investigation and libelant is therefore in a position to interview them; that the affidavit in support of libelant's motion does not allege that such action has been taken or that any effort has been made by libellant to interview or to take the deposition of any of these persons.

(4) Relative to the particular information which the affidavit in support of the motion states the libellant desires to obtain, and to further show that production of the Army Board of Investigation is not necessary, the following is stated:

(a) All reports, communications and memorandums except for the Army Board of Investigation have been filed in answer to libelant's interrogatories.

(b) That libelant has been furnished, in answer to his interrogatories, a statement as to the vicinity in which the vessel went down; that I am having corrected, in the answers to the interrogatories, a typographical error as to the latitude of this location.

(c) That by affidavit attached to respondent's motion to dismiss previously filed herein, R. L. Hiller, Assistant United States Attorney, stated, upon information and belief, that the vessel was sunk in a mine field.

(d) That as to the exact course and headings of the vessel and its navigation, libelant was advised in response to his interrogatories that the present whereabouts of the log books, if they survived the explosion and sinking, is not known. Moreover, that libelant has been furnished the names and

addresses of the master and the first officer aboard the vessel, the officers responsible for navigation at the time; that libelant's own affidavit reveals that permission has been granted by the War Department for the master of the vessel to disclose his knowledge surrounding the sinking of the LT-221, but that the libelant has not made any effort to interview the master and the first mate of the vessel or to obtain their depositions. The last known address of the master, as shown by answers to interrogatories, was 120 Oak Hill Avenue, Long Branch, New Jersey, within 100 miles of Philadelphia.

(e) That proctors for libelant are or should be familiar with the various publications of the United States Hydrographic Office which contain information relative to the location of the mine fields and danger areas, as well as the courses and headings of the free channels in the Mediterranean area, which include the Gulf of Cagliari and which can be obtained upon payment of the usual fee. A copy of Mediterranean Route Instructions No. 1 (Hydrographic Office Misc. Pub. No. 11639) has been furnished to opposing counsel in connection with the *Alltmont* and *O'Neill* cases which involve mine explosions in the Mediterranean area; further, that libelant in his interrogatories did not request specific information relative to channel locations in mine areas, although he had requested information of this type in the *O'Neill* case; a copy of the chart of the Cagliari area as of the date in question, with the channel and danger area marked thereon, is being obtained from the Department of the Navy and will be made available for examination by libelant. The chart of the area is available to libelant from the United States Hydrographic Office.

(f) The Army Board of Investigation contains no information as to the type of mine struck, whether the vessel's degaussing apparatus was in use and whether proper and sufficient lookouts had been posted; the respondent has not investigated these points any further.

5. Libelant does not show good cause nor does he show that the documents sought are not privileged.

PATRICK F. COONEY.

Sworn to and subscribed before me this 11 day of January, 1950.

SARA E. KIDWELL,
Notary Public, D. C.

My Commission expires Sept. 14, 1951.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT IN SUPPORT OF THE MOTION FOR THE PRODUCTION OF DOCUMENTS

[Endorsed: Filed August 14, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
City & County of Philadelphia, ss:

WILLIAM M. ALPER, being duly sworn according to law, deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that the within suit has been brought to recover damages for the wrongful death of the decedent while serving as a member of the crew of the Tug "LT-221" on October 15th, 1944; that the said vessel struck a mine causing an explosion while the vessel was enter-

ing the port of Cagliari, Sardinia, as a result of which the vessel foundered, causing the death of about half of the vessel's crew of about twenty-seven persons; that the United States of America, through the United States Army and other representatives and agents of the respondent, made an extensive investigation of the cause of this disaster and the facts relating thereto; upon information and belief, that shortly after the disaster the United States Army Board of Investigation interviewed and obtained sworn statements from all witnesses to this marine disaster and all persons having information as to the events preceding, leading up to and surrounding the explosion and sinking; upon information and belief, that the Tug "LT-221" was entering the harbor through a channel traversing a known mine field; that, in connection with the instant case, it will be necessary to determine the exact location of the aforesaid mine fields, the location and course of the free channel, if any, the exact courses and headings of the channel, the exact courses and headings of the vessel in entering the harbor before the explosion, whether the vessel deviated from the prescribed courses and headings, whether the vessel struck a floating mine or was navigated into a fixed mine field, what type of mine was struck, whether the vessel's degaussing apparatus was in use and whether proper and sufficient lookouts had been posted; that the respondent filed answers to the libellant's interrogatories on or about September 20th, 1948; that the aforesaid answers to interrogatories do not purport to supply information concerning the foregoing issues; that the affiant mailed approximately thirty-five letters to survivors of the disaster and witnesses identified in the answers to interrogatories; that libellant received only four letters from crew members which state that the tug struck a mine

but no information on the many relevant issues outlined above; that the libellant received a short letter from the master of the tug indicating the vessel struck a mine; that libellant again wrote to the master requesting detailed information regarding the disaster; that the master requested permission from the War Department to reply to libellant's letter, received no reply and, accordingly, refused to furnish the requested information; that thereafter, the libellant requested and obtained permission from the War Department for the master to disclose these facts to the libellant; that the libellant has been unable to interview the master and obtain a statement from the master; that the libellant did not receive replies from the witnesses identified in the respondent's interrogatories other than set forth above; that the production and inspection of the documents shown herein is most necessary for the proof of plaintiff's-libellants' causes of action and for the preparation of the cases for trial; unless said material is made available to plaintiffs-libellants, they may be unable to prove the actual facts upon the basis of which these causes of action can be sustained; production is necessary for purposes of discovery since all the defendants-respondents, by virtue of their investigative agencies and other broad facilities have had almost exclusive access to the facts of the occurrence here involved; production will also be necessary to prepare for any defense that might be raised by the defendants-respondents, and to properly cross-examine defendants'-respondents' witnesses, and for impeachment, if necessary.

WILLIAM M. ALPER.

Sworn to and subscribed before me this 3rd day of January, 1950.

[Title of Court and Cause]

OPINION OF DISTRICT COURT SUR LIBELANT'S MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed Aug. 14, 1950]

Before Kirkpatrick Ch. J.

This is an action under the Suits in Admiralty Act. The libellant is the administrator of a seaman who was killed when a vessel belonging to and operated by the United States struck a mine in an Italian port on October 15, 1944. The libel charges negligence in the navigation of the vessel, in failing to provide an adequate lookout, in failing to maintain adequate degaussing, life saving equipment and warning devices, and in other particulars.

It appears that shortly after the disaster, in the course of a proceeding before an Army Board of Investigation, sworn statements were obtained from all the witnesses to the actual sinking and from persons having information as to the events preceding and surrounding it.

The libellant filed a number of interrogatories asking for relevant facts known to the respondent. One interrogatory asked for the production of copies of all written statements (signed or unsigned) of witnesses obtained by the United States or its representatives. This, of course, includes the testimony of witnesses before the Army Board of Investigation. The respondent has answered the fact interrogatories and has produced a number of reports, communications and memoranda but has refused to produce any statements either oral or written procured by the Army Board of Investigation. This motion is to compel their production.

Both parties recognize that, since the decision of the

Court of Appeals for the Third Circuit in Alltmont v. United States, 177 F. 2d 971, this Court cannot order the production of copies of statements of witnesses under Admiralty Rule 31 (Civil Rule 33) and so obviate the necessity of showing the good cause required by Admiralty Rule 32 (Civil Rule 34). The motion does not specifically refer to either rule and it, therefore, will be treated as a motion under Rule 32 for the production of the documents. Good cause must be shown.

An affidavit has been filed by counsel for the libellant in which it is alleged that the information given by the respondent in response to the fact interrogatories does not give him information upon a number of points which he needs in order to prepare and prove his case and to cross-examine the respondent's witnesses; that the crew consisted of 29 of whom about half survived and that he has mailed some 35 letters to survivors and other witnesses identified by the respondent; that he has received only four letters from crew members, stating that the ship struck a mine but giving no information relating to the issues of negligence raised by the pleadings. The respondent does not question the truth of these statements.

In an opinion recently filed by this Court (Brauner v. United States, Civil Action No. 9793) it was pointed out that the mere fact that the party seeking production of statements given by witnesses has the witnesses' names and knows where to find them does not, under all circumstances, bar his right to have the statements produced. In the Alltmont case, supra, the Court of Appeals, in its order amending the original opinion, said no more than that if witnesses can be interviewed without undue burden or delay "it is quite possible" that the party asking for their statements "will be unable to show good cause". The plain implication is that undue burden or delay in interviewing the witnesses

may constitute good cause for acquiring the production of their statements.

The list of the witnesses in this case whose statements have been taken by the respondent, furnished by it in answers to interrogatories, shows that two of them reside in Mississippi, two in Texas, three in Louisiana, two in Massachusetts, one in Georgia, one at Oswego, New York, one in Chicago, and that the addresses of three (who were at the time of the answers Navy personnel) were Cagliari, Sardinia, and that one was a member of the Royal Air Force, with the same address. Attempted correspondence with these witnesses has proved unproductive. Even if more letters had been received they would have been no substitute for interviews and depositions. In view of the distances involved and the expense and difficulty of reaching the witnesses, it is plain that good cause exists for requiring the production of their statements.

The master's statement is a different matter. He resides within 100 miles of Philadelphia and it does not appear that his deposition cannot be taken. It may be that for one reason or another (see opinion in Brauner v. United States, supra) after the taking of the deposition good cause for the production of the statement can still be shown. This, however, is not before me at the present time.

In Brauner v. United States, supra, this Court, for reasons which need not be repeated here, held that the report of the Army Board of Investigation and the statements taken at that time are not privileged.

The libellant's motion will be granted except as to the statement of the master.

[Title of Court and Cause]

CLAIM OF PRIVILEGE BY THE SECRETARY, DEPARTMENT OF THE ARMY

[Endorsed: Filed October 9, 1950]

This Honorable Court, after a hearing on a motion of libelant to compel production of all statements of witnesses obtained by the United States or its representatives, indicated in its memorandum opinion that the expression "statements of witnesses" included the official transcript of the testimony of the witnesses before the Board of Officers created to investigate and inquire into the sinking of the Army Tug LT-221 in the presence of the enemy on October 15, 1944, and that libelant's motion will be granted except as to the "statement" (i.e., the official transcript of testimony) of the master of the Army Tug LT-221.

The Army Tug LT-221 was a public vessel of the military forces of the United States operated by the Army Transport Service. The vessel was engaged exclusively in a military operation in time of war when it was sunk in the Gulf of Cagliari in a mine field in a forward combat area. The Report of the Board of Officers concerning the sinking of the Army Tug convened at Headquarters, Allied Garrison, Sardinia, on October 20, 1944, was rendered pursuant to the provisions of Army Regulations 420-5 and other pertinent regulations. This investigation, directed at the discipline and efficiency of personnel and organizational components of the armed services, was conducted during war time and testimony was taken under service regulation of security and confidence.

Custom, precedent, and rules of the Department of the Army, as recorded in paragraph 29, Army Regulations 420-5, 20 May 1940, copy of which is attached

hereto, marked "Exhibit A", consider reports by boards of officers to be confidential in character and forbid the furnishing of copies thereof to persons inside or outside the Department of the Army, other than officials authorized by chain of command or administration to receive them, except with my special approval in each case.

In my official capacity as the Secretary of the Army, I have examined the Report of the Board of Officers, rendered in conformity with Army Regulations 420-5 concerning the sinking of the Army Tug LT-221, and find that it contains information by inferior to superior military personnel as to the discipline and efficiency of military personnel and organizational components of the armed services; that it relates to the internal management of the Department of the Army; that it is confidential for good cause found; that the production of the whole or any part thereof in this proceeding would be contrary to the public interest. Therefore, pursuant to my authority as head of the Department of the Army, I assert the privileged status of the Report of the Board of Officers, and of every part thereof, and most respectfully decline to permit the whole or any part thereof to be produced in this action.

(S.) FRANK PACE, JR.,
Secretary of the Army.

AFFIDAVIT OF RALPH R. SEARS, COLONEL, TRANSPORTATION CORPS, UNITED STATES ARMY

[Endorsed: Filed October 9, 1950]

AFFIDAVIT

I, Ralph R. Sears, Colonel, Transportation Corps, United States Army, being duly sworn depose and say:

I am the Chief of the Terminal Operations and Installations Division, Office of the Chief of Transporta-

tion, United States Army. I have held my present position since August 22, 1950 and a part of the duties of my office and those of my predecessors is maintaining regular records in the Office of the Chief of Transportation covering the assignment, employment and activities of vessels of which the Transportation Corps of the United States Army has control.

That based upon these records kept in the regular course of the operations at my office, it is my information and belief that the vessel, Army Tug LT-221, was built in 1943 specifically for the United States Army by the Marietta Manufacturing Company, Point Pleasant, West Virginia, and upon completion was immediately delivered to and accepted by the Army on October 7, 1943, and that the said Army Tug LT-221 was continuously owned and operated solely by the United States Army from the date of her aforesaid delivery until the date of her sinking in October 1944. Furthermore, to the best of my information and belief, at all times during the voyage on which the LT-221 was engaged when she was sunk, she was assigned to the North African Theater of Operations for service in time of war in military operations, and she was not engaged at any time in commercial service or employed as a merchant vessel.

RALPH R. SEARS,
Colonel, TC,
Chief of Terminal Operations and
Installations Division,
Office of the Chief of Transportation,
United States Army.

STATE OF VIRGINIA,
County of Arlington, ss:

Sworn and subscribed to before me this 2 day of October 1950.

FREDA B. BRILL,
Notary Public,
Arl. Co. Va.

My commission expires March 14, 1951.

AFFIDAVIT OF MR. ALEXANDER COREY, CHIEF OF THE CIVILIAN PERSONNEL BRANCH, PERSONNEL DIVISION, OFFICE OF THE CHIEF OF TRANSPORTATION, UNITED STATES ARMY

Mr. Alexander Corey, Chief of the Civilian Personnel Branch, Personnel Division, Office of the Chief of Transportation, United States Army, after being duly sworn, deposes and says:

That while in the Military Service in the capacity of an officer of the Army of the United States, I became Chief of the Civilian Personnel Branch of the Office of the Chief of Transportation, United States Army, on or about April 1942, at the time when the Transportation Corps was first organized, and that I continued in such capacity, together with performing the responsibility for labor relations in that office to the date of my discharge from the Military Service in August 1946, at which time I assumed like duties in the same office and with my present title, and that I have been continuously engaged in that position to the present time.

That there is maintained in this Branch, under my jurisdiction, and has been regularly maintained since

its organization, records of the authorized manning scale of vessels operated directly by the Army. That these records, now in my office, show that the United States Army had authorized on 7 December 1943, a full manning scale, as authority for the complete crewing (civilian ship's officers, including master and men) of the Army Tug LT-221 by civilian employees of the United States Army, engaged under Civil Service rules pertinent to such marine type of employment. That such authority for crewing the Army Tug LT-221 in this fashion by United States Government civilian employees is shown by the records of this Branch to have continued until 27 October 1944.

That the authorization of the employment of such civilian crew members was for full-time employment, solely in connection with the operation of said vessel by the United States Army without the intervention of any other employer.

(S.) ALEXANDER COREY,
Chief, Civilian Personnel Branch,
Personnel Division,
Office of the Chief of Transportation,
United States Army.

STATE OF VIRGINIA,
County of Arlington, ss:

Sworn and subscribed to before me this 15th day of September 1950.

(S.) FREDA B. BRILL,
Notary Public,
Arl. Co. Va.

SEAL.

My commission expires Mar. 14, 1951.

[Endorsed: Filed Oct. 9, 1950]

[Title of Court and Cause]

RESPONDENT'S MOTION FOR REHEARING UPON LIBELANT'S MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed October 17, 1950]

Comes now the respondent and moves this Honorable Court for a rehearing upon libelant's motion to compel the production by the United States of the proceedings before an Army Board of Investigation created to investigate and inquire into the sinking of the Army Tug LT-221 and states his ground therefor as follows:

1. The instant libel was instituted under the jurisdictional provisions of the Suits in Admiralty Act to recover for the death in the performance of duty in the presence of the enemy of a public vessel crew member of a vessel operated by the armed services. The claim of jurisdiction under the Suits in Admiralty Act has been denied by the United States. Exceptive allegations have been filed of record, challenging this Court's jurisdiction under the Suits in Admiralty Act or any other jurisdictional statute. The United States has further asserted as a bar to libelant's action the affirmative defense that the liability of the United States to a public vessel crew member injured in the performance of duty aboard a vessel operated by the armed services is exclusively under the Federal Employees' Compensation Act.

2. Consideration of any issue of negligence or unseaworthiness to which the record of the Army Board of Investigation could be pertinent presupposes a determination of these questions of jurisdiction and of the bar of the Government's exclusive liability under the Federal Employees' Compensation Act. No final determination has as yet been made as to either the ques-

tion of this Court's jurisdiction or as to the bar resulting from the exclusive liability of the United States under the Federal Employees' Compensation Act. These questions must be determined before the United States may be called upon to produce any part of the report of proceedings of the Army Board of Investigation.

3. The jurisdiction of the Court and the effect of the exclusive liability under the Federal Employees' Compensation Act should be determined first or at least at the same time that this Court determines whether it may properly order the production of the record of the proceedings of the Army Board of Investigation.

4. In connection with the question of jurisdiction and the effect of the exclusive liability of the United States under the Federal Employees' Compensation Act, this Court should consider the record before the Bureau of Employees' Compensation relating to the compensation claim on account of libelant's decedent. The United States desires to file a transcript of that record prior to further consideration of these questions by this Court.

5. If this Court should determine that it has jurisdiction and that the exclusive liability of the United States under the Federal Employees' Compensation Act does not bar this action, consideration of the documents which the United States has filed of record since this Court's opinion of August 15, 1950, is necessary before any final determination regarding the production of the record of the Army Board of Investigation should be made. These documents are as follows:

Claim of privilege by the Secretary, Department of the Army.

Affidavit of Ralph R. Sears, Colonel, Transportation Corps, United States Army.

Affidavit of Alexander Corey, Chief of Civilian Personnel Branch, etc., United States Army.

6. The claim of privilege made by the Secretary of the Army for the record of the proceedings of the Army Board of Investigation convened to investigate a casualty occurring in a war zone in the presence of the enemy demands further consideration by this Court in view of the action which this Court has taken in the case of *Brauner* v. *United States*, Civil No. 9793. As the Secretary has determined that the record cannot be produced, this Court, if it determines that it has jurisdiction and the action is not barred, must decide the form of the interlocutory decree against the United States which it will enter.

WHEREFORE respondent prays for a rehearing and for such other and further relief as is just.

Respectfully,

(S.) GERALD A. GLEESON,
United States Attorney,

To: Freedman, Landy and Lorry,
900 Jefferson Building,
1015 Chestnut Street,
Philadelphia 7, Pennsylvania:

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 30th day of October, 1950, or as soon thereafter as counsel can be heard.

(S.) GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT RE PRODUCTION OF MASTER'S TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION

[Endorsed: Filed October 24, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
County of Philadelphia, SS.

WILLIAM M. ALPER, being duly sworn according to law, deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that the within suit has been brought to recover damages for the wrongful death of the decedent while serving as a member of the crew of the Tug "L.T.-221" on October 15, 1944; that upon information and belief, the said vessel struck a mine while the vessel was entering the port of Cagliari, Sardinia, causing an explosion, as a result of which the vessel foundered, causing the death of about half of the vessel's crew; that the United States of America, through the United States Army and other representatives and agents of the respondent, made an extensive investigation of the cause of this disaster and the facts relating thereto; that shortly after the disaster the United States Army Board of Investigation interviewed and obtained sworn statements from all witnesses to this marine disaster and all persons having information as to the events preceding, leading up to and surrounding the explosion and sinking; that the libellant filed a motion for production of the statements taken in the record of proceedings of the aforesaid investigation; that on August 14, 1950 Judge William H. Kirkpatrick filed an opinion directing the respondent to produce statements of these witnesses

except the statement of the Master, Ernest A. Hambacher; that your affiant endeavored to obtain information relative to the aforesaid explosion from Hambacher by letter and that this information was refused on the ground that Hambacher considered himself to be under a pledge of secrecy and could not discuss the accident with your affiant unless he was specifically authorized to do so by the United States Army; that subsequent to the opinion filed in this case on August 14, 1950, your affiant personally endeavored to discuss the case with Hambacher at his home and that Hambacher reaffirmed his position, as set forth above; that both Hambacher and your affiant requested the United States Army to authorize and permit Hambacher to discuss this case with your affiant but without success.

WILLIAM M. ALPER.

Sworn to and subscribed before me this 24th day of October 1950.

JESSIE D. VALENTI,
Notary Public.

My Commission Expires Jan. 4, 1953.

CERTIFIED COPIES OF DOCUMENTS IN THE FILE OF THE BUREAU OF EMPLOYEES' COMPENSATION, RELATING TO THE CASE OF ROBERT WILLIE DILLEHAY JR.

[Endorsed: Filed October 25, 1950]

DEPARTMENT OF LABOR

Washington, October 12, 1950.

I hereby certify that the annexed are true copies of documents in the case of Robert Willie Dillehay, Jr., fatally injured October 15, 1944, while employed as Third Assistant Engineer by the War Department, Transportation Corps aboard the U.S.A.T. LT-221

(Case No. X-93871). Also certified statement of compensation payments made in such case as shown by the records of the Bureau of Employees' Compensation, U. S. Department of Labor.

on file in the Bureau of Employees' Compensation, U. S. Department of Labor, Washington, D. C.

WILLIAM MCCAULEY,
Director.

OFFICE OF THE SECRETARY

I hereby certify that William McCauley who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Employees' Compensation, U. S. Department of Labor and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 18th day of December one thousand nine hundred and fifty.

(S.) MAURICE J. TOBIN,
Secretary of Labor.

Federal Security Agency

BUREAU OF EMPLOYEES' COMPENSATION
Washington 25, D. C.

November 12, 1949

File No. X-93871

Mrs. Eleanor D. McNamee
1315 Marlborough St.
Philadelphia, Pa.

Dear Madam:

Reference is made to the case of Robert Willie Dillehay, Jr., who was fatally injured while employed by the Federal Government.

The Federal Employees' Compensation Act, as amended by Public Law 357, 81st Congress, approved October 14, 1949, provides for increased compensation beginning November 1, 1949, as follows:

Child —— $87.91 per month

Within 10 days after December 1, 1949, a check for $87.91 will go forward to you representing compensation at the new rate for the month just past.

THIS COMPENSATION IS THE MOST THAT CAN BE ALLOWED UNDER PRESENT LEGISLATION.

All the other terms, conditions and limitations stated in your original notice of award remain unchanged and compensation for any period preceding November 1, 1949, is not affected.

Very truly yours,

BUREAU OF EMPLOYEES' COMPENSATION.
s/s AK

File No. X-93871

Adjustment of Death Benefits Under Public Law 357 —81st Congress—Approved October 14, 1949

(1) Date of Injury—10/15/44
(2) Monthly pay when injured—$228.33 ($45.00—S & Q)
(3) Increase monthly pay rate ..... 10% (Strike out percentage increase not applicable) $22.83.
(4) Monthly pay rate for compensation beginning November 1, 1949—$251.16
(5) Entitlements

(a) Widow	% Monthly award	
(b) Children (1)	35 % Monthly award	$87.91
(c) Parents	% Monthly award	
(d) Brothers and Sisters	% Monthly award	
(e) Grandparents and Grandchildren	% Monthly award	
Total Monthly Compensation		$87.91

(6) Payees

(a) Widow	$87.91
(b) Children	
(c) Parents	
(d) Others	

(See File or payroll transcript for names and addresses of payees)

Date Nov. 10, 1949 Examiner s/ WJH
Date FWH Nov. 11, 1949 Certified s/ FWH

Statement of Compensation Payments in the case of Robert Willie Dillehay, Jr., fatally injured October 15, 1944, while employed as Third Assistant Engineer by the War Department, Transportation Corps aboard the U.S.A.T. LT-221, Case No. X-93871 by the BUREAU OF EMPLOYEES' COMPENSATION, FEDERAL SECURITY AGENCY & DEPT. OF LABOR

		Amount Paid	Date Paid
Payments to Mrs. Eleanor B. Dillehay, natural guardian for Doris Ann Dillehay, her daughter from October 16, 1944 to June 30, 1946.		$288.75	3/10/46
		8.75	3/16/46
		8.75	4/1/46
		8.75	4/16/46
		8.75	5/1/46
		8.75	5/16/46
		8.75	6/1/46
		8.75	6/16/46
		8.75	7/1/46
		$358.76	
Payments to Mrs. Eleanor D. McNamee, natural guardian for Doris Ann Dillehay, her daughter, from October 16, 1944 to February 13, 1946 (date of widow's marriage)	$278.33		
from February 14, 1946 to June 30, 1946	199.79		
	$478.62		
Less amount previously paid for the period October 16, 1944 to June 30, 1946	358.75	$119.87	7/8/46
Payments to Mrs. Eleanor D. McNamee, natural guardian for Doris Ann Dillehay, her daughter from July 1, 1946 to September 30, 1950.		21.88	7/16/46
		21.88	8/1/46
		21.88	8/16/46
		21.88	9/1/46
		21.88	9/16/46
		21.88	10/1/46
		21.88	10/16/46
		21.88	11/1/46
		21.88	11/16/46
		21.88	12/1/46
		21.88	12/16/46
		21.88	1/1/47
		21.88	1/16/47
		21.88	2/1/47
		21.88	2/16/47
		21.88	3/1/47
		21.88	3/16/47
		21.88	4/1/47
		21.88	4/16/47
		21.88	5/1/47
		21.88	5/16/47
		21.88	6/1/47
		43.75	7/1/47
		43.75	8/1/47
		43.75	9/1/47

43.75	10/1/47
43.75	11/1/47
43.75	12/1/47
43.75	1/1/48
43.75	2/1/48
43.75	3/1/48
43.75	4/1/48
43.75	5/1/48
43.75	6/1/48
43.75	7/1/48
43.75	8/1/48
43.75	9/1/48
43.75	10/1/48
43.75	11/1/48
43.75	12/1/48
43.75	1/1/49
43.75	2/1/49
43.75	3/1/49
43.75	4/1/49
43.75	5/1/49
43.75	6/1/49
43.75	7/1/49
43.75	8/1/49
43.75	9/1/49
43.75	10/1/49
43.75	11/1/49
87.91	12/1/49
87.91	1/1/50
87.91	2/1/50
87.91	3/1/50
87.91	4/1/50
87.91	5/1/50
87.91	6/1/50
87.91	7/1/50
87.91	8/1/50
87.91	9/1/50
87.91	10/1/50
Total	$3,195.74

Certified True Statement

E. W. Laws
Fiscal Officer

Federal Security Agency

Bureau of Employees' Compensation

Washington 25, D. C.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code, I hereby certify that the annexed are true copies of documents in the file of the Bureau of Employees' Compensation, Federal Security Agency, relating to the case of Robert Willie Dillehay, Jr., deceased, former 3rd Assistant Engineer aboard "LT-221", North African Theatre of Operations, United States Army Transport Service, War

Department, (File No. X-93871). The originals of these copies are now on file with the Bureau of Employees' Compensation, Federal Security Agency, located at 4th and Independence Avenue, N. W., Washington, D. C.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed this 7th day of October 1948.

By direction of the Federal Security Administrator.

(s/d) L. W. O'HEARN,
Acting Executive Assistant.

* * * * * * *

Federal Security Agency

BUREAU OF EMPLOYEES' COMPENSATION

Case No. X-93871

In the matter of the claim for compensation under the U. S. Employees' Compensation Act of September 7, 1916, as amended, of ELEANOR B. DILLEHAY, widow, and DORIS ANN DILLEHAY, minor daughter, Claimants.

On account of the death of ROBERT WILLIE DILLEHAY, JR., Decedent.

War Department (New Orleans Port of Embarkation) Reporting Establishment

FINDING OF FACTS AND AMENDED COMPENSATION ORDER

The above named decedent drowned on October 15, 1944, in the North African Theater of Operations, while in the performance of duty as an employee of the War Department, Transportation Corps, aboard the USAT LT-221, and Finding of Facts and award was filed on April 3, 1946 awarding compensation to Eleanor B. Dillehay as the natural guardian of Doris Ann Dillehay, decedent's daughter, at the rate of 10% of the maxi-

mum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or if over eighteen and incapable of self-support, until becoming capable of self-support. Additional investigation in respect to the above entitled claim having been made as is considered necessary, and after consideration of such claim and additional evidence of record, the Bureau makes the following

FINDING OF FACTS

That Eleanor B. Dillehay remarried on February 14, 1946; that the compensation otherwise payable to Eleanor B. Dillehay on her own account from October 16, 1944 to February 13, 1946, inclusive, is less than the war risk insurance which she received from the War Shipping Administration; that she will at no time be eligible to receive compensation on her own account as a widow.

Upon the foregoing finding of facts it is ordered that the aforementioned award be and the same is hereby modified and compensation commencing February 14, 1946 be paid to Eleanor D. McNamee as the natural guardian of Doris Ann Dillehay, decedent's daughter, subject to modification in accordance with section 10 of the Act as follows:

Doris Ann Dillehay, daughter, 25% of the maximum wage, $175.00, or $43.75 per month until she dies, marries, reaches the age of eighteen, or if over eighteen and incapable of self-support, becomes capable of self-support.

Given under my hand at New York, New York, this 2nd day of February, 1947.

WM. MCCAULEY,
Director,
Bureau of Employees' Compensation.

WJH: tr. January 31, 1947.

* * * * * * *

Findings of Fact and Award in the Case of Robert Willie Dillehay, Jr., File No. X-93871

The Commission, having considered the evidence submitted in the claim for the benefits of the U. S. Employees' Compensation Act of September 7, 1916, on account of the death of Robert Willie Dillehay, Jr., makes the following

Findings of Fact

That Robert Willie Dillehay, Jr., aged 22, a civil employee of the United States Government, employed by the War Department, Transportation Corps, New Orleans Port of Embarkation, as a 3rd Assistant Engineer aboard the USAT LT 221, was lost at sea on October 15, 1944, in the explosion and sinking of the tug;

that he was in the performance of duty at the time he was reported missing;

that there is a Report of Death from the Adjutant General's Office on file;

that the rate of pay of the decedent was $2200.00 per annum, plus subsistence and quarters valued at $540.00 per annum, plus a bonus of $183.33, or a monthly wage of $411.66, for the purposes of computing compensation;

that a claim for compensation on account of the death, on Form CA 5, was received in this office on May 3, 1945, within one year of the death, filed by Eleanor B. Dillehay, born November 11, 1921, as the widow of the decedent, on her own behalf, and on behalf of Doris Ann Dillehay, born February 13, 1943, the minor daughter of the decedent;

that Eleanor B. Dillehay is the widow of the decedent and was living with him at the time of death within the meaning of the Act;

that Doris Ann Dillehay is the minor daughter of the decedent;

that there was on the decedent's life a war risk insurance policy in the amount of $5500.00 under which Eleanor B. Dillehay, widow of the decedent, was the designated beneficiary;

that Eleanor B. Dillehay, widow of the decedent, has received the $5500.00 war risk benefit and will not be eligible to receive compensation on her own account until the amount otherwise payable exceeds the proceeds of the war risk insurance benefits which she received;

that Doris Ann Dillehay received no benefits of the war risk insurance;

that in consideration of an award made to Eleanor B. Dillehay as the natural guardian, on behalf of the minor daughter of herself and the decedent, she executed before a notary public and submitted a release of all demands against the United States of America and all its departments and agents, which is now on file.

Upon the foregoing facts the Commission makes the following

AWARD

Compensation for the death of the said Robert Willie Dillehay, Jr., shall be paid to the widow on behalf of the minor daughter of the decedent, subject to modification in accordance with the provisions of Section 10 of the Act as follows:

Doris Ann Dillehay, daughter, 10% of the maximum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or, if over eighteen and incapable of self-support on account of some mental or physical disability, until becoming capable of self-support.

Given under our hands at New York, New York, this 3rd day of April, 1946.

——— ———,
Chairman,

ALBERT H. LADNER, JR.,
Commissioner,

HATTIE W. CARAWAY,
Commissioner.

Attest:

WM. MCCAULEY,
Secretary.

WJH:tr 3/28/46

* * * * * * *

Release executed by Eleanor B. Dellehay, dated February 12, 1946.

RECEIVED FROM the United States of America an award of Seventeen and 50/100 Dollars ($17.50) per month on account of my child, Doris Ann Dillehay, and the child of Robert Willie Dillehay, Jr., commencing October 16, 1944, under Section 10 of the Public Law 267, 64th Congress, approved September 7, 1916, as amended, to continue until the child dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she becomes capable of self-support, in consideration for which I hereby release the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are

r were the owners, agents, charterers, masters, offi-
ers and crews of said vessels, of each and every right
r claim which I now have or may hereafter have be-
ause of any matter or thing which happened before
he signing of this paper; and particularly, but not in
imitation of any of the foregoing general terms, of
nd from all claims arising out of or in any way con-
ected with the death of my late husband, Robert
Willie Dillehay, Jr., while he was serving as a mem-
er of the crew of the USAT LT-221.

IN WITNESS WHEREOF I have hereunto set my hand
nd seal this 12 day of February, 1946.

ELEANOR B. DILLEHAY.

TATE OF TENNESSEE
County of Shelby
City of Memphis

On the 12th day of February, 1946, personally ap-
eared the above named Eleanor B. Dillehay, known
o me to be the person whose signature appears next
bove, and acknowledged the free and voluntary exe-
ution of the above release with full appreciation of
s effect.

EDITH JACKSON,
Notary Public.

My Commission Expires Oct. 17, 1948

IBT:tr

* * * * * * *

June 15, 1945.

Mrs. Eleanor Dillehay
967 Maxey Street
Memphis, Tennessee

Dear Madam:

The War Department has notified this Commission that Robert W. Dillehay died as a result of a war risk while in the performance of duty as a civil employee of the Army Transport Service.

This Commission under the United States Employees' Compensation Act of September 7, 1916, may pay compensation for such death to the persons indicated below:

(a) The widow who was living with or dependent for support upon the deceased employee at the time of his death.
(b) The unmarried children under 18, and those over 18 who are incapable of self-support.
(c) Parents partially or wholly dependent upon the deceased employee for support.
(d) Unmarried brothers, sisters, or grandchildren under 18 years of age, and those over 18 who are incapable of self-support, and who were wholly or partially dependent upon the deceased employee.
(e) Grandparents wholly or partially dependent upon the deceased employee.

If a valid claim is established by you compensation would be payable at a rate not to exceed $61.25 per month on account of yourself as widow, and at a rate not to exceed $17.50 per month on account of the child.

The Division of Wartime Insurance, War Shipping Administration, 99 John Sreet, New York 7, New York, has informed the Commission that the above named

seaman designated you as his beneficiary for the proceeds of $5500.00 war risk benefit provided by the Army Transport Service.

Your right to benefits under the Compensation law and under the war risk benefit plan and the procedure you should follow to obtain such benefits is explained below. It should not be necessary for you to employ the services of an attorney to obtain such benefits. If you do not understand any part of the plan described herein please write to the Commission for further advice.

Benefits under the Federal Employees' Compensation Law.

If you establish a valid claim under the law as a widow of the deceased employee by submitting proof of a valid marriage you would be entitled to receive compensation at a rate not to exceed $61.25 per month until your death or marriage. Inasmuch as there is a surviving child of the decedent you would also be entitled to an amount not exceeding $17.50 per month additional for that child until she reaches 18 years of age or marries. Compensation on account of the child may be paid after the child reaches 18 years if she is physically or mentally incapable of self-support. Compensation under the law would be paid to you in regular instalments on the first and sixteenth of each month.

Inasmuch as you have already filed a claim, Form CA-5, together with proof of marriage and birth certificate of the child of the deceased with the United States Employees' Compensation Commission, it will not be necessary to re-submit these documents. Should you desire to receive compensation as widow for yourself and child, or compensation only for the child you should so notify the United States Employees' Compensation

Commission, 285 Madison Avenue, New York 17, New York, by letter.

The benefits described above would be paid immediately after receipt and approval of your claim *unless* you should apply for and receive the war risk benefit described below. In the latter event you would not receive instalment payments of compensation as widow until approximately April 15, 1952, and then only if you have not remarried. (However, acceptance of the war risk benefit would not affect immediate payment of compensation on account of your child.) Read carefully the paragraphs below relating to the war risk benefit.

WAR RISK BENEFIT

The Army Transport Service has arranged with the War Shipping Administration to provide war risk benefit payment for death of a seaman caused by a war risk. In your case such benefit is $5500 and you have been designated the beneficiary and are therefore entitled to such payment in a lump sum upon proof of valid claim made to the War Shipping Administration. Enclosed is letter addressed to the Chief Adjuster, Division of Wartime Insurance, War Shipping Administration, 99 John Street, New York 7, New York, together with questionnaire, both of which are marked form B. You should fill out the questionnaire in accordance with instructions on the last page of the questionnaire and sign the letter, and then mail the same to the Chief Adjuster. Provision has been made in the letter for you to indicate whether or not you claim the war risk benefit. *The questionnaire should be completed by you and forwarded to the Chief Adjuster regardless of whether you claim the war risk benefit.*

When certified copies of documents such as marriage certificates, birth certificates, etc., are furnished with

claim for compensation they need not be furnished with the claim for the war risk benefit. If such certificates are submitted with claim for the war risk benefit they need not be furnished with the claim for compensation. Appropriate reference should be made to the claim with which the certificates were furnished.

Effect of Acceptance of War Risk Benefit

If you claim and receive the war risk benefit in a lump sum the amount so paid to you by the War Shipping Administration will be offset against compensation otherwise payable to you under the Compensation law. No compensation could be paid to you until the amount of such accrued compensation equals the amount of the benefit you have received from the War Shipping Administration. This offset applies only against the compensation otherwise payable to the person named as beneficiary under the war risk benefit plan. In case the war risk benefit is paid to the estate of the deceased seaman and a claimant for compensation receives a share of the war risk benefit through distribution of such estate, the amount actually received by such claimant shall be offset against the compensation that would otherwise be paid.

Effect of Acceptance of Compensation Benefits

If you claim and receive compensation under an award made by the Commission in accordance with the provisions of the Federal Employees' Compensation Law, the amount so paid to you will be offset against the benefits otherwise payable to you under the war risk benefit plan. No war risk benefit will be paid to you by the War Shipping Administration while you are receiving compensation and you will be required to sign a release of your rights to the war risk benefit in the

amount received by you as compensation from the Commission.

Very truly yours,

C. R. MIDDLETON,
Chief of Section.

WJH:glf
Official copy to:

Chief Adjuster, Division of Wartime Insurance
War Shipping Administration, 99 John Street,
New York 7, New York

The Chief, Officer of the Chief of Transportation
War Department, Washington, D. C.
Att: Colonel R. M. Hicks, Chief, Water Division

The Commanding General, New Orleans Port of Embarkation
Army Transport Service, Poland & Dauphine Streets
New Orleans 12, La.
Att: Port Civilian Personnel Officer.

* * * * * * *

[Title of Court and Cause]

LIBELLANT'S ANSWER TO RESPONDENT'S MOTION FOR REHEARING

[Endorsed: Filed October 27, 1950]

1. Denied. On the contrary, it is averred that libellant instituted the within suit under the Suits in Admiralty Act, the Public Vessels Act, and general maritime law. It is admitted that excepted allegations were filed by the respondent challenging the jurisdiction of this Court and asserting the affirmative defense that the Federal Employees' Compensation Act is the exclu-

sive remedy in this case. It is further averred that respondent's Exceptions to the Libel and the excepted allegations were argued before the Honorable James P. McGranery and that these exceptions were overruled by the Court: *Mandel vs. United States,* E.D.Pa., 74 F. Supp. 754.

2. Denied. On the contrary, it is averred that the jurisdiction of this Court and the alleged bar and exclusive remedy of the Federal Employees' Compensation Act were determined by Judge James P. McGranery in *Mandel vs. United States,* supra.

3. Denied. On the contrary, it is averred that the jurisdiction of this Court has already been determined in *Mandel vs. United States,* supra, and that that opinion is the law of this case.

4. Denied.

5. Denied. On the contrary, it is averred that respondent's claim of privilege and the fact that the Tug LT-221 was operated by the United States Army Transportation Corps and all other facts set forth in the affidavits of Colonel Ralph R. Sears and Alexander Corey were before the Court and considered by this Court in connection with the opinion filed by your Honor on August 14, 1950.

6. Denied. It is admitted that this Court must determine the form of decree to be entered herein.

WHEREFORE, libellant prays that the petition for rehearing be denied.

FREEDMAN, LANDY AND LORRY,
(Sd.) By WILLIAM M. ALPER,
Proctors for libellant.

[Title of Court and Cause]

ORDER OF DISTRICT COURT, DENYING RESPONDENT'S MOTION FOR REHEARING

[Endorsed: Filed November 1, 1950]

ORDER

AND NOW, to wit, this 30th day of October, 1950, argument having been made on the Motion for Rehearing in connection with the opinion dated August 14, 1950, requiring production of documents, and due consideration having been given thereto, the Motion for Rehearing is hereby denied.

KIRKPATRICK,
U.S.D.J.

[Title of Court and Cause]

ORDER OF DISTRICT COURT FILED NOVEMBER 1, 1950, REQUIRING RESPONDENT TO PRODUCE NOTES OF TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION EXCEPT FOR STATEMENTS OF THE MASTER OF THE LT-221

[Endorsed: Filed November 1, 1950]

ORDER

AND NOW, to wit, this 30th day of October 1950, in accordance with the opinion filed August 14, 1950, it is hereby

ORDERED that the respondent produce the notes of testimony of all witnesses taken in connection with the Army Board of Investigation into the sinking of the Tug LT-221, and any statements taken therein excepting the notes of testimony or statements taken from the

Master for inspection and copying by the libellant within twenty days from the date of this order.

KIRKPATRICK,
U.S.D.J.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT RE PRODUCTION OF MASTER'S TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION

[Endorsed: Filed November 3, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

WILLIAM M. ALPER, being duly sworn according to law deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that on October 25, 1950 libellant filed an affidavit relating to his efforts to obtain a statement from Captain Ernest A. Hambacher; that your affiant erroneously stated in the aforesaid affidavit that he was unable to obtain authorization from the United States Army to discuss this case with Hambacher; that subsequent to that time your affiant discovered a letter which had inadvertently been misplaced in libellant's file and which had been addressed to libellant's counsel by the War Department on March 10, 1947, a true and correct copy of which is attached hereto and marked Exhibit "A".

WILLIAM M. ALPER.

Sworn to and subscribed before me this 1st day of November, 1950.

(Sd.) JESSIE D. VALENTI,
Notary Public.

My Commission Expires Jan. 4, 1953.

EXHIBIT "A"

WAR DEPARTMENT

Office of the Judge Advocate General
Washington 25, D. C.

JAGL 1946/9683

10 Mar 1947

Messrs. Freedman, Landy and Lorry
906 Jefferson Building
1015 Chestnut Street
Philadelphia 7, Pennsylvania

Gentlemen:

Your letter of 6 January 1947 addressed to the Office of The Adjutant General, wherein you request permission to have Mr. Ernest A. Hambacher, master of the United States Army Tug LT-221, and a civilian employee of the United States Army at the time of the sinking of said vessel, testify in behalf of your client in the action brought by the Estate of Robert W. Dillehay, Jr., Deceased, against the United States, has been referred to this office for reply.

The third paragraph of your aforementioned letter indicates that you desire to have Mr. Hambacher testify concerning the events leading to the sinking of the above-mentioned vessel outside the Port of Cagliari, Sardinia, on 15 October 1944. The War Department has no objection to Mr. Hambacher testifying concerning any material facts relative to the sinking of the above vessel, inasmuch as the former need for secrecy of such information no longer exists.

Sincerely yours,

(S.) W. P. CONNALLY, JR.,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

[Title of Court and Cause]

LIBELLANT'S MOTION FOR JUDGMENT BECAUSE OF RESPONDENT'S FAILURE AND REFUSAL TO PRODUCE DOCUMENTS IN VIOLATION OF AN ORDER OF COURT

[Endorsed: Filed December 11, 1950]

To the Honorable, the Judges of the United States District Court:

Libellant, by his counsel, Messrs. Freedman, Landy and Lorry moves your Honorable Court for an order entering judgment against the respondent and in favor of the libellant for the following reasons:

1. This action was brought to recover damages for the wrongful death of a member of the crew of a tugboat operated by the respondent, who was killed in the course of a disaster when the tugboat encountered one or more mines at or near the port of Cagliari, Sardinia.

2. Following this marine disaster, a number of hearings were conducted by the United States Army Board of Investigation, and sworn statements and testimony were rendered by various witnesses regarding the cause and other circumstances of the explosion and foundering of the vessel.

3. In order to properly prepare for trial, libellant sought production of the statements and testimony rendered in the foregoing hearings under Admiralty Rule 32, to which application respondent filed exceptions.

4. After due hearing and argument by the respective parties, this Court rendered an opinion on August 14, 1950, holding that the respondent was required to produce all of the statements and notes of testimony, excepting those rendered by the Master.

5. After the opinion of the District Judge was filed,

respondent moved for a rehearing which, after further argument, was denied by the Court.

6. On October 30, 1950, this Court entered an order in accordance with the opinion filed on August 14, 1950, directing that the documents referred to be produced within twenty days from the date of the order.

7. Respondent, by its counsel, replied to the Court that it would refuse to produce the required documents, and has now failed and refused to produce the said documents within the period of twenty days as required by the Order of Court.

8. Libellant alleges that the documents referred to contain relevant and important facts concerning the liability of the respondent for the death of the decedent in this case, which information has not been heretofore disclosed in the answers to interrogatories. It is therefore averred that the respondent's refusal to produce the documents required under the Order of Court is most prejudicial to the libellant.

WHEREFORE, libellant prays your Honorable Court for an order pursuant to Admiralty Rule 32C entering judgment in favor of the libellant, and that the case proceed to trial solely on the question of damages.

FREEDMAN, LANDY AND LORRY,
By
WILLIAM M. ALPER,
Proctors for Libellant.

[Title of Court and Cause]

TRANSCRIPT OF HEARING ON MOTION FOR JUDGMENT HELD DECEMBER 11, 1950

Philadelphia, Pa., December 11, 1950

[Endorsed: Filed January 4, 1951]

Before HONORABLE WILLIAM H. KIRKPATRICK, *J.*
(In Chambers)

Present: *Freedman, Landy & Lorry, Esqs.*, by *Abraham E. Freedman, Esq.*, and *William M. Alper, Esq.*, representing the Libellant.

James P. McCormick, Esq., Assistant United States Attorney, By *Patrick F. Cooney, Esq.*, representing the Respondent.

Mr. COONEY: The Respondent in this case has throughout, first, by filing excepting allegations, second, in its answer to the libel, third, its motion for rehearing in connection with the discovery proceedings, contended as a defense that the exclusive remedy on account of the death of Robert Willie Dillehay is compensation rights under the United States Employees Compensation Act.

In connection with previous hearings we have, on record, affidavits from the Army Transportation Corps showing the nature of the vessel, and properly certified records of the Bureau of Employees Compensation relative to this case.

At this time I would like to offer in evidence, to supplement those previous documents, the certified records of the General Accounting Office setting forth the payments of compensation made by the United States on account of the death of Robert Willie Dillehay.

(The documents were produced by Mr. Cooney.)

Mr. FREEDMAN: Well, sir, we object to it, Your Honor, because this issue was brought up before Judge McGranery quite some time ago, passed upon by him, and their contention was denied then.

The only issue which is now before Your Honor is the failure of the Respondent here—

THE COURT: Yes, that is what I was going to ask. Isn't the only question here whether the United States has forfeited its right to defend by failing to produce certain evidence in response to an order of Court?

Mr. FREEDMAN: Exactly, sir.

THE COURT: Even if they have such a right they would have to assert it at the trial, and inasmuch as they have incurred the penalty which the Court ordered, I don't believe it is even before me at the present time.

Isn't that the situation?

Mr. FREEDMAN: That is the way we feel about it.

THE COURT: They may have a number of defenses, but if they don't produce, in response to the Court's order, they forfeit all the defenses that they may have by the entry of judgment.

(Off record discussion)

THE COURT: Well, all right, then I will sustain the objection to the offer and proceed to enter judgment.

Mr. COONEY: In that case, Your Honor, we would like to have these marked for identification.

THE COURT: Oh, yes, all right.

Mr. COONEY: Because, as we have contended, these are separate and independent defenses, other than the negligence.

(Certified copies of documents on file in the General Accounting Office in the case of Mrs. Eleanor B. Dillehay and Mrs. Eleanor D. McNamee were marked as Respondent's Exhibit 1 for identification, 12/11/50.

Certified copies of documents on file in the General

Accounting Office in the case of Mrs. Eleanor D. McNamee were marked as Respondent's Exhibit 2 for identification, 12/11/50.)

THE COURT: All right.

Well, I haven't done any more than just barred them from the negligence question. This is an entry of judgment.

Mr. FREEDMAN: That is the way—

THE COURT: I mean, in the Alltmont case all I did was to prevent them from offering evidence to disprove negligence. In this case there is a general entry of judgment on possible defenses, which is within the power of the Court.

Mr. FREEDMAN: Well, once you enter judgment—

THE COURT: It is a question of which penalty you select.

Mr. FREEDMAN: Well, in the Alltmont case there was a more practical effect. It was pretty much the same—

THE COURT: Well, it wasn't quite the same, because in the Alltmont case there still was the defense that they could have made that it was a normal risk of wartime and that there was no liability for negligence under war conditions. I think they had that defense still to make. That was the reason in the Alltmont case, as I remember, that I confined it to the limitation of their right to disprove negligence, but here the matter is in the full discretion of the Court as to what the penalty to be assessed is, and if the Court feels it proper it can enter a general judgment, which is what I am doing here.

Mr. FREEDMAN: Well, Judge, may I ask that you strike out of the record all reference to the Alltmont case, because that is still pending and in the event there is any question about it—

Oh, well, no, the judgment—

THE COURT: It doesn't make any difference.

Mr. Freedman: That is right.
The Court: All right, here it is.

[Title of Court and Cause]

Interlocutory Decree Entered December 11, 1950

[Endorsed: Filed December 11, 1950]

Interlocutory Decree

And now, to wit this 11th day of December, 1950, it is

Ordered, Adjudged and Decreed that judgment be and hereby is entered in favor of the libellant and against the respondent and that the case proceed to trial solely on the question of damages.

Kirkpatrick,
U. S. D. J.

[Title of Court and Cause]

NOTICE OF APPEAL AND ORDER ALLOWING APPEAL

[Endorsed: Filed December 20, 1950]

Please take notice that the United States of America, respondent in the above entitled cause hereby appeals to the United States Court of Appeals for the Third Circuit from the Interlocutory Decree of this court entered herein on December 11, 1950, ordering, adjudging and decreeing that judgment be entered in favor of the libellant and against the respondent and that the case proceed to trial solely on the question of damages.

GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent,
U. S. Courthouse, 9th &
Market Sts. Phila., Pa.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

KIRKPATRICK,
U. S. D. J.

Dated: December 20, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951

[fol. 100] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,385

SAMUEL MANDEL, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased

v.

UNITED STATES OF AMERICA, Appellant

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

Argued June 6, 1951

Before Goodrich and Kalodner, Circuit Judges and Marsh, District Judge

OPINION OF THE COURT—Filed August 16, 1951

By GOODRICH, Circuit Judge:

This appeal brings before the Court the question of the right of a civilian crew member of a ship owned and operated by the United States to sue the government for injuries received in the course of his employment.

October 8, 1946 a libel was filed by the administrator of the estate of Robert Dillehay, Jr. against the United States of America seeking damages in behalf of deceased's widow and child. It alleged that on October 15, 1944 Dillehay was employed by the United States as a civilian officer of the tug LT-221, that the vessel hit a mine off Sardinia and sank, [fol. 101] causing the death of Dillehay and that the explosion resulted from improper equipment or from careless navigation of the vessel. The government filed exceptions to the libel moving, inter alia, that it be dismissed on the ground that the tug was a public vessel and that deceased was entitled to compensation under the Federal Employees' Compensation Act, 5 U. S. C. A. § 751 et seq., and that this remedy precluded suit under the Public Vessels Act, 46 U. S. C. A. § 781.

The District Court [1] concluded that the action was main-

[1] 74 F. Supp. 754 (E. D. Pa. 1947).

tainable under either the Public Vessels Act or the Suits in Admiralty Act,[2] and found it unnecessary to decide whether the tug LT-221 was a merchant or public vessel.

The United States thereafter answered, denying negligence, and reasserting its defense of immunity from suit. In due course libellant served interrogatories on the United States which were answered by it. Finally, a motion under Admiralty Rule 32 for production of a report by the Army Board of Investigation regarding the sinking of the tug LT-221 was made by libellant before Chief Judge Kirkpatrick. The court granted the motion on August 14, 1950.[3] A petition for rehearing was then filed, along with a writing signed by the Secretary of the Army, called a "claim of privilege," stating that the report was confidential and declining to permit its production. Judge Kirkpatrick refused a rehearing by order dated November 1, 1950. December 11, 1950 judgment was entered against the government for failure to comply with the order to produce the documents and it was ordered that the case proceed to trial solely on the question of damages. From this order the United States appeals.[4]

The appellee suggests that no question is before us on this appeal except that of privilege by the Secretary of the [fol. 102] Army to refuse to release information which he regards it important to keep secret. The refusal to recognize the claimed privilege was the basis of the District Court's entry of judgment, it is said, and the points on appeal must be confined to the propriety of that order. Appellee's counsel admits readily, however, that he would like to see the broader question of liability passed upon.

We think that the question of liability of the United States under the statutes relied on is before us at this time. Since the case is, as already indicated, properly in this Court on appeal, we think the appeal is as broad as any questions raised by the appellant on the record as it now exists. The reason is analogous to the rule which requires a plaintiff not to split his causes of action at the pain of being pre-

---

[2] 46 U. S. C. A. § 741 et seq.

[3] 93 F. Supp. 692 (E. D. Pa. 1950).

[4] This is an interlocutory order from which an appeal is allowed under 28 U. S. C. A. § 1292(3).

cluded from further suit when one segment has been split off and decided.[5] Permitting an interlocutory appeal is an exception to the general rule of the federal statutes that appeals may be had only from final judgments. The exception certainly does not go so far as to permit multiple appeals where they may be avoided. We think it both good law and good sense that we should consider at this stage the fundamental point made by the United States, namely that it is not liable at all to this plaintiff.

It is true that the District Court entered judgment in favor of the libellant and against the United States because of the latter's refusal to produce a given document or record.[6] While from one point of view that action is in the nature of a penalty, the wider question is whether the United States is liable to suit at all. If it is not, it is not at fault in failing [fol. 103] to produce what, in that event, is an irrelevant document. We proceed, then, to the broader question.

We have in this case the not unusual situation of a problem arising under a statute to which the statute itself gives no answer. It is clear that if the vessel on which officer Dillehay was employed was a "public vessel" his widow and child are entitled to compensation as provided in the federal statute.[7] But there was nothing in the federal compensation law in 1944 which said expressly that if one is entitled to compensation that was the only remedy

[5] Restatement, Judgments § 62 (1942).

[6] Such action is authorized by Admiralty Rule 32C(b)(2)(iii). This rule is identical with Rule 37(b)(2)(iii) of the Rules of Civil Procedure. The entry of a default judgment under the latter has been held not to preclude inquiry by the Court of Appeals into the jurisdiction of the District Court. Michigan Window Cleaning Co. v. Martino, 173 F. 2d 466 (6th Cir. 1949). Cf. Fenton v. Walling, 139 F. 2d 608 (9th Cir. 1943). Sovereign immunity is a jurisdictional matter. See Nassau Smelting Works, Ltd. v. United States, 266 U. S. 101, 106 (1924); Minnesota v. United States, 305 U. S. 382, 389 (1939); Restatement, Judgments §§ 5, comment k and 9, comment b (1942).

Compare, also, Fed. R. Civ. Proc. 55(e).

[7] 5 U. S. C. A. § 751 et seq.

he could have.[8] On the other hand, there is nothing expressly said in the Public Vessels Act or the Suits in Admiralty Act that a man injured under the circumstances set out in the plaintiff's libel may or may not sue. Furthermore, the only help counsel have been able to give us on the matter of legislative history is argumentative conclusion from the fact that such and such was done. We are told what Congress "must" have had in mind, but nothing in the way of committee report or anything authentic or convincing on the subject.

We are necessarily faced then with the general problem: May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained by the administrator of the decedent for the damages caused by his death. 46 U. S. C. A. § 761. We think there are several reasons why the Compensation Act should be held to be the exclusive measure of rights in this case.

[fol. 104] 1. The first reason is the analogy to the rule under Workmen's Compensation Acts which are now an accepted and almost universal part of state legislation. It is the general rule that unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable, at least so far as rights against the em-

---

[8] In 1949 the Federal Employees' Compensation Act was expressly made exclusive. 63 Stat. 861, 5 U. S. C. A. § 757(b). The amendment contains the proviso, "* * * That this subsection shall not apply to a master or a member of the crew of any vessel." This amendment has no application to the case at bar, since the action was pending when the amendment became effective. See FECA Amendments of 1940, § 303(g), 63 Stat. 867, 5 U. S. C. A. § 757, note. Furthermore, what little legislative history is available indicates only that Congress did not wish to legislate affirmatively on the rights of seamen because no discussion of the problem had been had in committee. See Cong. Rec. 13,607-609 (1949). Johnson v. United States, 186 F. 2d 120, 124 (4th Cir. 1950).

ployer are concerned.[9] One must not generalize too widely from this rule because many of the statutes provide expressly that the remedy is exclusive.[10] Nevertheless, we think the general rule represents the crystallization of the thought of both law makers and courts upon the subject. The Compensation Acts are intended to provide a more humane, adequate and generally fair method of dealing with accidents incurred by employees in the course of employment than the former common-law rules of employers' liability. They are intended to do away with prolonged and expensive litigation with hard cases going uncompensated because of inability to show fault on the part of the employer. We think that in general the natural inference would be that the Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages.

2. The reliance on the Compensation Act alone will remove an element of unfairness otherwise present in the type of case represented here. The typical make-up of the personnel of public vessels is a crew of employees some of whom are in the armed forces, some of whom are civilians. They are all said to be subject to the same discipline while engaged in the particular voyage,[11] although the civilians have the privilege of terminating their service in a fashion [fol. 105] more convenient to themselves than is open to members of the armed forces. Those members of the armed forces injured while on active duty have such compensation and only such compensation as Congress has provided by

---

[9] Prosser, Torts, p. 543 (1941); Schneider, Workmen's Compensation Law, §§ 89-154 (1941).

[10] The absence of a provision declaring the FECA exclusive is not helpful as an indication of Congressional intent. At the time of its passage there were no statutes permitting suit against the government. Note, however, that the Shipping Act of 1916, 39 Stat. 728 (1916), the first of such acts, was passed the same day as the FECA.

[11] 10 U. S. C. A. § 1473(d). Cf. In re Berue, 54 F. Supp. 252 (S. D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943).

the military pension and compensation laws.[12] We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate.[13]

3. We find weight in the government's argument that it would not be in the public interest to have judicial review of the question of negligence in the conduct of military, or semi-military, operations. The operation of ships or land forces in the presence of the enemy is a matter where judgments frequently have to be made quickly and where judgments so made by commanding officers must have prompt and immediate response. It will not, we think, aid in the operation of the armed forces if the propriety of a commander's judgment is to be tested months or years afterwards by a court or a court and jury. What, in the light of subsequent events, may appear to be a lack of caution may have been the very thing necessary, or apparently necessary, at the time the action was taken.

This point is sharply emphasized by examination of the various allegations of negligence set out in the libel. Among others it charges the following:

> (b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;
> [fol. 106] (d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;

---

[12] Bradey v. United States, 151 F. 2d 742 (2d Cir. 1945), cert. den. 326 U. S. 795 (1946), reh. den. 328 U. S. 880 (1946); Dobson v. United States, 27 F. 2d 807 (2d Cir. 1928), cert. den. 278 U. S. 653 (1929). Cf. Feres v. United States, 340 U. S. 135 (1950) (Tort Claims Act).

[13] It would also discriminate against civilian seamen employed by the United States through the War Shipping Administration who are authorized to sue the United States for the tort but are excluded from the FECA by the War Shipping Administration (Clarification) Act of 1943, 50 U. S. C. A. App. § 1291.

(h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances;

We do not think that examination of such questions with a view to determining negligence of an officer in a combat zone is a suitable subject for court review. Suppose the injuries were sustained in a large scale hurried evacuation comparable to Dunkirk, or an even larger scale invasion like that on the coast of Normandy. Court examination of the precautions taken for the safety of civilian employees on hospital ships, tugs and transports to determine whether due care to this plaintiff had been observed seems to us an incongruous subject for litigation.

Further, the production of evidence necessary in such an investigation in a public trial does not seem to us desirable from the standpoint of national defense. It is true that there is no longer armed conflict in the Italian theater, and there has not been for some time. But armed conflict in which we are involved goes on in other parts of the world. There are interests unfriendly to the United States which would be willing enough to learn anything possible about the way our operations are or were carried on. We have no lack of confidence in the discretion or integrity of our trial courts. But that is not the point. No judge has it as part of his task to act as an intelligence officer for the armed forces. He cannot tell how the facts developed out of one incident, seemingly isolated and unimportant, may fit into a larger picture worked upon by an active and skilled hostile espionage system. We do not think he should be called upon to pass upon such a question.

In our view, therefore, the considerations point to the conclusion that the rights of the parties involved in this litigation are such rights as the Federal Employees' Compensation Act gives them and no more.

[fol. 107] As would be expected in such a difficult and close question as this one is, we do not find the authorities speaking with unanimity. The very question before us has been presented and thoughtfully considered in the Fourth Cir-

cuit. Johnson v. United States, 186 F. 2d 120 (1950).[14] It is hardly necessary to add that we disagree with diffidence from a conclusion that Circuit reaches. But since we do reach a different conclusion it is our business to say so and we do. The other authorities relevant to the subject are as follows:

The Supreme Court has held that the Public Vessels Act permits suit for personal injury as well as property damage; American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947), and for injuries caused by the crew as well as the vessel itself, Canadian Aviator, Ltd. v. United States, 324 U. S. 215 (1945). It has held also that claiming and accepting payments under the FECA bars suit against the United States under the Federal Control Act. Dahn v. Davis, 258 U. S. 421 (1922). See also Brady v. Roosevelt S. S. Co., 317 U. S. 575, 581 (1943); Militano v. United States, 156 F. 2d 599 (2d Cir. 1946) (Public Vessels Act); Parr v. United States, 172 F. 2d 462 (10th Cir. 1949) (Tort Claims Act). And recently the Supreme Court held that members of the military were not authorized by the broad language of the Tort Claims Act to sue the United States for injuries received on active duty, but were relegated to their compensation and pension remedies. Feres v. United States, 340 U. S. 135 (1950). Cf. Brooks v. United States, 337 U. S. 49 (1949).

The Fourth Circuit has held that the compensation remedy did not preclude suit by a United States customs inspector against the United States under the Suits in [fol. 108] Admiralty Act. United States v. Marine, 155 F. 2d 456 (1946); cf. The Culberson, 61 F. 2d 194 (3d Cir.

---

[14] Accord: Henz v. United States, 1950 A. M. C. 714 (N. D. Cal. 1950). Cf. United States v. Loyola, 161 F. 2d 126 (9th Cir. 1947) (libel dismissed on merits); Gibbs v. United States, 94 F. Supp. 586 (N. D. Cal. 1950) (election barred recovery); Sims v. United States, 1950 A. M. C. 714 (N. D. Cal. 1950) (maintenance and cure); Jentry v. United States, 73 F. Supp. 899 (S. D. Cal. 1947) (back wages). Contra: Lopez v. United States, 59 F. Supp. 831 (S. D. N. Y. 1944).

1932).[15] The Second Circuit has twice concluded that the military components of the crew of public vessels cannot sue under the Public Vessels Act. Bradey v. United States [16] and Dobson v. United States, supra. O'Neal v. United States, 11 F. 2d 869, aff'd 11 F. 2d 871 (2d Cir. 1926), held that the Public Vessels Act did not authorize suit by a member of the crew of a coast guard ship, but the decision was based partly on the theory, since rejected by the Supreme Court in the Canadian Aviator case, that the Public Vessels Act covered only damages caused by the vessel itself.

Further analysis of these decisions seems not to be useful. We are in square conflict with the Fourth Circuit decision and the view expressed by our confreres in the Ninth Circuit.[17, 18] If the considerations advanced above are correct, our conclusion follows.

The question whether the vessel involved in the accident out of which this litigation grows was a public vessel was

---

[15] In many cases suit against the United States by a crew member of a government-owned merchant vessel has been permitted without discussion of the FECA. See, e. g. Krey v. United States, 123 F. 2d 1008 (2d Cir. 1941); Sevin v. Inland Waterways Corp., 88 F. 2d 988 (5th Cir. 1937); Stewart v. United States, 25 F. 2d 869 (E. D. La. 1928). See Gibbs v. United States, 94 F. Supp. 586, 589 n. 9 (N. D. Cal. 1950).

[16] In that case it was stated that: "* * * Congress did not expect those in its service upon 'public vessels' to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries." 151 F. 2d 742, 743 (2d Cir. 1945).

[17] United States v. Loyola, 161 F. 2d 126 (9th Cir. 1947). The libel seeking damages for failure to provide maintenance and cure was dismissed on the merits.

[18] Since this opinion was written the Second Circuit has decided the case of Johansen v. United States, — F. 2d — (July 30, 1951). The majority in that case agree with the point of view we have endeavored to express and disagree with Johnson v. United States, 186 F. 2d 120 (4th Cir.).

passed upon by the District Court. There is general allegation that it was a public vessel, and there are allegations of fact and affidavits which tend to support the public vessel conclusion, but no proof was heard. If the libellant desires to prove that the tug LT-221 was not a public vessel he should have that opportunity. If it is not, the case [fol. 109] presents lines of inquiry the extent of which need not be speculated upon at this time.

In view of our disposition of the case as discussed above, the question of privilege does not need to be passed upon.

The judgment of the District Court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true Copy. Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 110] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,385

SAMUEL MANDEL, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased

vs.

UNITED STATES OF AMERICA, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present. Goodrich and Kalodner, Circuit Judges, and Marsh, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this case be, and the same is hereby reversed and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

Ida O. Creskoff, Clerk.

August 16, 1951.

Received & Filed Aug. 16, 1951. Ida O. Creskoff, Clerk.

[fol. 111] I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief of Appellant and proceedings in this court in the case of Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased, vs. United States of America, Appellant, No. 10,385, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 10th day of September in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-sixth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 112] Supreme Court of the United States, October Term, 1951

No. 414

[Title omitted]

Order Allowing Certiorari—Filed January 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.